



## **The Haida Nation and Taku River Tlingit Decisions: Clarifying Roles and Responsibilities for Aboriginal Consultation and Accommodation**

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# The *Haida Nation* and *Taku River Tlingit* Decisions: Clarifying Roles and Responsibilities for Aboriginal Consultation and Accommodation

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In November, 2004, the Supreme Court of Canada released its decisions in *Haida Nation*<sup>2</sup> and *Taku River Tlingit*<sup>3</sup>, two important cases which dealt with aboriginal consultation and accommodation obligations related to resource development. The two decisions have provided greater clarity regarding the role and responsibilities of government, aboriginal groups and industry in consultations with aboriginal communities and accommodation of aboriginal concerns. This article highlights some key points in the decisions for the oil and gas industry.

## Background

The two cases arose out of disputes between the Province of British Columbia and two B.C. First Nations — the Haida Nation and the Taku River Tlingit First Nation. In the first case, the Haida Nation challenged decisions by the Province in the early 1990s to approve the transfer of a tree farm licence from one forestry company to another. In the second case, the Taku River Tlingit challenged a decision by the Province in 1994 to grant a project approval certificate under the B.C. *Environmental Assessment Act* to Redfern Resources for an access road to an old mine site.

In both cases, the First Nations asserted that they had aboriginal rights and title to the lands and resources affected by the government's decisions, but they had not proved those rights either by litigation or by treaties with government. The two First Nations took the position that the decisions would affect their aboriginal rights and title, and so the Province had to consult with them about those decisions. The Province, on the other hand, took the position that it did not have to consult with either First Nation unless and until the First Nations had proved the existence of their rights.

In both instances, the B.C. Court of Appeal agreed with the First Nations' arguments, and held that the Province should have consulted with the First Nations

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<sup>2</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

<sup>3</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74.

about the decisions, even though the First Nations had not legally proved the existence of their aboriginal rights and title. In the *Haida Nation* case, the Court of Appeal went even further, holding that Weyerhaeuser, the private company that held the tree farm licence in question, shared the Province's duty to consult with the Haida Nation. This aspect of the *Haida Nation* decision was very controversial.

Both decisions were appealed to the Supreme Court of Canada, and represented the first time the Supreme Court considered governments' duty to consult when making land and resource use decisions that could affect aboriginal rights and title.

### **Asserted Rights Can Trigger Crown Consultation Obligations**

In the *Haida Nation* case, the Supreme Court held that asserted aboriginal rights can trigger government's obligation to consult. The Court said that the duty to consult arises when government knows about, or ought to know about, the potential existence of an aboriginal right or title and contemplates a decision that might adversely affect it. It is not necessary for an aboriginal group to prove the legal existence of its rights before the duty arises. The Court held that consultation obligations may be triggered by decisions ranging from the granting of tenures and project approvals to permitting and licensing decisions. This underscores the tremendous volume of consultation that may be required of governments and aboriginal groups as a consequence of the Supreme Court's decisions. The onus will be on governments to develop approaches to consultation that are proportionate to decisions being made and that do not impose unworkable burdens on government decision-makers, aboriginal groups being consulted or oil and gas companies.

### **Scope of Duty to Consult is Proportionate to Impact of Decision**

The Supreme Court did not try to define how much consultation is required of governments in all circumstances where a duty to consult is triggered. Instead, the Court stated that governments will have to determine how much consultation is required on a case-by-case basis. The Court said in *Haida Nation* 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 [of the proposed decision] upon the right or title".<sup>4</sup> At one end of the spectrum, the duty to consult may be met through notifying the First Nation about the proposed decision and discussing concerns; at the other end, "deep consultation" is required. In most cases, the consultation required will be somewhere in the middle of the spectrum; the key for government will be to determine correctly

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<sup>4</sup> *Haida Nation*, at ¶39.

in each case how strong the asserted right is and consequently how much consultation is required.

### **Duty to Consult Rests Solely with Crown**

In *Haida Nation*, the Supreme Court also settled the controversy over the B.C. Court of Appeal's extension of the government's duty to consult to industry. The Supreme Court indicated in no uncertain terms that the duty to consult is not shared by industry, stating that the "Crown alone remains legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests",<sup>5</sup> that "the ultimate legal responsibility for consultation and accommodation rests with the Crown" and cannot be delegated,<sup>6</sup> and that third parties "cannot be held liable for failing to discharge the Crown's duty to consult and accommodate".<sup>7</sup> The Supreme Court put to rest with finality any notion that industry shares government's obligation to ensure that infringements of aboriginal rights are justified.

While this was one of the more newsworthy aspects of the Supreme Court's decision in *Haida Nation*, its practical impact on oil and gas companies may not be great in the short term. As is discussed below, the oil and gas industry consults with aboriginal communities and other stakeholders for a variety of other reasons not directly connected to government's duty to consult. The Supreme Court's limiting of the duty to consult to government will therefore likely not reduce in a significant way the amount of consultation that oil and gas companies carry out with aboriginal communities in the short term.

In addition, while oil and gas companies may not be directly liable to aboriginal groups for government's failure to consult adequately, it must be remembered that tenures and approvals granted by government to oil and gas companies remain vulnerable to challenge on grounds of inadequate consultation. The industry therefore continues to have a very strong interest in ensuring that governments comply with their newly defined consultation obligations.

### **Crown Can Delegate Procedural Aspects of Consultation to Third Parties**

While confirming that the duty to consult rests solely with government, the Supreme Court stated that it is open to governments to delegate "procedural aspects" of consultation to third parties, drawing a parallel to the manner in which environmental impact assessments are carried out.<sup>8</sup> This appears to make it possible for

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<sup>5</sup> *Haida Nation*, at ¶53.

<sup>6</sup> *Haida Nation*, at ¶53.

<sup>7</sup> *Haida Nation*, at ¶56.

<sup>8</sup> *Haida Nation*, at ¶53.

government to rely on industry consultations with aboriginal communities to help determine whether any government obligations to consult and accommodate may be triggered.

The Supreme Court's express provision for delegation of procedural aspects of consultation could lead to more cost-effective consultation processes by avoiding unnecessary duplication of government and industry consultation activities. Many oil and gas companies — particularly the larger ones — have the capacity and the expertise to engage aboriginal communities in effective project-specific consultations. It is also primarily these companies who have the ability to implement mitigation measures through changes to project design and planning, and to provide economic benefits to the aboriginal community that offset to some degree the impacts experienced by the community. Particularly where governments' and aboriginal groups' resources are stretched to capacity dealing with consultations and with other important community issues, it makes sense to avoid needless duplication of efforts. In this sense, the Supreme Court's recognition of industry's potential role in consultation is helpful.

At the same time, this delegation carries risks for oil and gas companies as well. In an era of government restraint and cut-backs, governments may try offload as much as possible of the work and the costs of government consultations onto oil and gas companies.

### **Government Can Design Consultation Processes**

Another very significant aspect of the decisions is the Supreme Court's recognition that government may determine how aboriginal consultation and accommodation should be carried out in relation to government decision-making. In *Taku River Tlingit*, the Supreme Court rejected the argument that government must develop a separate process for consultation with First Nations, outside of the normal statutory process. Governments may determine how best to integrate consideration of aboriginal interests into government decision-making. The Supreme Court indicated that it will not hold government to a standard of perfection in judging the adequacy of consultation processes. Instead, the standard is reasonableness: the process selected by government must be a reasonable means of considering aboriginal rights in government decisions, and must represent a reasonable effort to consult and inform.

This is a very significant point. While governments now have significant consultation obligations as a result of these decisions, the Supreme Court has also provided governments with the power to design and implement effective consultation processes that are integrated into governmental decision-making processes in a manner that makes sense to governments. Governments now have to support that power with the necessary resources for and commitment to consultation.

## **Duty to Accommodate Rests with Crown**

The Supreme Court distinguished between the duty to consult and the duty to accommodate. In some cases, once government consults with an aboriginal group no further action may be required. But in other cases, a separate duty to accommodate may be triggered.

The duty to accommodate — or “seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation”<sup>9</sup> — arises when government consultations with an aboriginal group show a strong likelihood that the asserted aboriginal right does in fact exist, and when the proposed government decision would affect that right in a significant way. As with the duty to consult, the duty to accommodate applies only to the government making the decision affecting the asserted right. The duty cannot be delegated to third parties like oil and gas companies. While the Supreme Court recognized that procedural aspects of consultation could be carried out by third parties, no such provision was made with respect to accommodation. The effect of this is unclear.

In a practical sense, two very tangible kinds of accommodation are commitments to mitigation measures by a company, and the provision of employment and contract opportunities and other project-related benefits by the company to the affected aboriginal group and its members. There has been uncertainty in the past as to whether such measures by industry can be considered by government in assessing whether aboriginal interests have been adequately accommodated. The Supreme Court’s omission of any reference to delegation of any aspects of accommodation to industry means this question may remain unsettled.

## **No Aboriginal Veto over Resource Decision Making**

The Supreme Court said that the duty to consult is based in the honour of the Crown, and does not arise out of any fiduciary duty. This has clarified another important area of uncertainty. It is now clear that government need not make resource management decisions based solely on what is in the best interests of the affected aboriginal groups. Rather, government is entitled to balance other societal interests against aboriginal interests in making those decisions.

A consequence of government’s ability to balance societal and aboriginal interests is that government need not obtain the consent of affected aboriginal groups to a proposed decision, or to proposed accommodation measures, prior to making the decision. The Supreme Court is clear that aboriginal groups have no veto over

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<sup>9</sup> *Haida Nation*, at ¶49.

government decisions. If government consults with an aboriginal group through a reasonable process, and gives appropriate consideration to the aboriginal rights asserted by the aboriginal group and the potential impact of the government's decision on those rights, the Supreme Court has indicated that the courts should not interfere with the resulting decision, even if the aboriginal group does not support it.

While the honour of the Crown requires government to participate in meaningful consultations with aboriginal groups with the intention of substantially addressing aboriginal concerns, the Supreme Court recognized that meaningful consultation is a two-way street. The Court held that aboriginal groups cannot frustrate good-faith attempts at consultation by government by taking unreasonable positions in the consultation process.<sup>10</sup> The Court did note that hard bargaining is not inconsistent with good faith consultations.

## **Potential Implications for Oil and Gas Companies**

### *Limited Short-term Impact on Oil and Gas Companies*

Perhaps the single most important effect of the decisions is to reduce substantially uncertainty around key aspects of consultation obligations. By making it clear that the obligation to consult is government's alone, that it can be triggered by asserted rights, and that government can structure consultation processes and make decisions without requiring aboriginal consent, the Supreme Court has resolved many procedural uncertainties which have complicated consultations in recent years. Uncertainty is usually expensive for developers, so this additional certainty will be welcomed by developers.

Although the two decisions have provided much-needed clarification around the parameters and responsibilities for aboriginal consultations respecting infringements of aboriginal rights and title, it is unlikely that they will cause developers to change their consultation practices in the short term. This is because developers' consultation activities with aboriginal communities have not been driven by the need to consult in respect of infringements of rights.

Oil and gas companies consult with aboriginal communities (and others affected by their activities) for three main reasons:

- it is their corporate policy to consult with aboriginal groups and other stakeholders;

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<sup>10</sup> *Haida Nation*, at ¶42.

- they are required to consult with aboriginal communities and other stakeholders by statute, regulations, or terms of their tenures from government; or
- they have entered into agreements with the aboriginal communities which provide for consultations.

In recent years, oil and gas companies have also relied on direct consultations with aboriginal groups, and agreements resulting from those consultations, as a means of managing project risks associated with governments' failure to consult, or consult adequately, with aboriginal groups about those projects. The increased clarity provided by the *Haida Nation* and *Taku River Tlingit* decisions has perhaps reduced project risks related to adequacy of government consultation efforts, but has not reduced the need for companies to consult to discharge statutory and regulatory obligations, corporate policy requirements or contractual obligations.

Oil and gas companies will therefore continue to have a strong interest in developing and maintaining good relationships with the aboriginal communities affected by their activities.

### *Longer Term Issue: How Will Governments Respond*

In the longer term, the impact of the decisions on developers will depend on how provincial and federal governments respond to the direction provided by the Supreme Court. The two decisions have made it clear that governments have the power to make land and resource use decisions necessary to maintain the health of provincial and national economies, even in the face of disagreement from aboriginal groups. The Supreme Court was very clear in placing the onus on government to ensure adequate consultation and accommodation occurs around those decisions, but has given government the legal tools needed to develop or adapt the necessary consultation processes.

It is now up to government to respond to those challenges. Government will have to determine whether existing decision-making processes provide for adequate consultation. Where changes are necessary, government will have to decide whether to integrate aboriginal consultations into the duties of existing statutory decision-makers, or to lay new processes focused solely on aboriginal consultations over the current regulatory structure (as was typically done with environmental assessment processes). Government will have to ensure that the staff, resources and commitment is put in place to allow effective consultations. Government may also have to consider whether funding is required for First Nations for consultation and capacity building, both to discharge any duties arising from the honour of the Crown and to ensure that First Nations can provide input to decision-makers in a timely manner. Government will



also have to decide whether — or which — procedural aspects of consultation should be delegated to developers.

As well, governments will have to decide whether to limit new consultation processes to geographic areas where aboriginal rights and title have not been established, or whether to provide for similar consultation in areas covered by the historic treaties. The two decisions arose in the context of asserted aboriginal rights, as opposed to treaty rights, and the Supreme Court gave no indication as to whether they should be taken to apply more broadly. If governments believe that the logic behind the two decisions applies equally well in historic treaty areas, they may implement appropriate consultation and accommodation processes in historic treaty areas without waiting for courts to consider the issue.

It is in the oil and gas industry's interest to ensure that government does respond appropriately to these decisions. While the Supreme Court was very clear in stating that industry cannot be liable to aboriginal groups for the Crown's failure to consult adequately, Crown tenures and authorizations granted to developers in breach of that duty remain subject to legal challenge. This is a much more significant concern to the industry. As a result, there is an important role for industry in encouraging governments to implement consultation and accommodation processes that comply with the Supreme Court of Canada's decisions as quickly as possible.

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