
Implications for Environmental Lawyers

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Starting Point:

- Section 35 *Constitution Act*

  💎 The existing aboriginal and treaty rights are hereby recognized and affirmed
“R. v. Sparrow” 1990

- Aboriginal Rights are not absolute

- Rights can be infringed, but infringement must be justified
Infringement

- Is the limit unreasonable?
- Does it impose undue hardship?
- Does it deny holders of right preferred means of exercising right?
Justification

- **Existence of valid legislative objective such as conservation management**
- **Is Honour of the Crown upheld taking into consideration:**
  - Priority allocation of resource;
  - Minimal infringement of right;
  - In situation of expropriation, was fair compensation made; and
  - Was aboriginal group consulted in relation to restriction.
Haida and Taku both decided:

- The Crown has a duty to consult and, in some cases, accommodate where the interests of aboriginal people may be affected by a crown action or decision.

- Asserted rights v. Proven Rights
Source of Duty to Consult: Honour of the Crown

- Crown must act honourably in order that pre-existing aboriginal societies be reconciled with Crown Sovereignty

- Does not flow from fiduciary obligation
Overview:

- Good faith reciprocal obligation;
- Recognition that Crown must govern and manage competing interests;
- Crown duty; not industry duty;
- Duty is proportionate to assessment of strength of right and potential adverse effect on right or title – Spectrum of Consultation;
Overview continued…

- Separate process likely not required;
- Consult as early as possible;
- Consultation can occur in stages;
- Aboriginal groups must outline concern with clarity; and
- Consent not required
Overview concluded...

Standard of Review

- **Correctness** – Characterization of Claim and potential for impact
- **Reasonableness** – Assessment of consultation efforts
Implications for Environmental Lawyers:

- When does duty to consult arise?
- Freestanding duty of consultation
- Existence of Consultation Policy
- Increased Expectations:
  - Who?
  - How?
  - Enough?
Implications for Environmental Lawyers – continued...

- **Direct** (e.g. regulate hunting/fishing)

- **Indirect**
  - Land management;
  - Forestry Tenure dispositions;
  - Energy Tenure dispositions;
  - Requests for capacity funding;
  - Prosecutions; and
  - On the horizon:

  - *Canada (Minister of Canadian Heritage) v. Mikisew Cree First Nation*
Questions

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