A Primer on the Constitutional Duty to Consult

Over the last few decades, the government’s duty to consult and accommodate Aboriginal peoples has been recognized by Canadian courts as a means to reconcile the relationship between the Crown and Aboriginal peoples. In practice, it is also an opportunity for Aboriginal peoples to have a greater degree of influence over what happens in their traditional territories. This is because the duty to consult and accommodate requires government authorities to create opportunities for participation and input from Aboriginal peoples impacted by proposed decisions.

What is the Duty to Consult and Accommodate?

The duty to consult was recognized as a legal requirement pursuant to section 35 of the Constitution Act, 1982 as early as 1990 in *R. v. Sparrow* and has been affirmed and developed by the Supreme Court of Canada in several cases since. The goal of consultation and accommodation is to provide protection for Aboriginal and treaty rights and to minimize or eliminate the impacts on such rights.

Consultation – How Should it Work?

The Crown must consult with Aboriginal peoples before taking action (which includes authorizing resource development) that may affect claimed or proven Aboriginal and treaty rights. Consultation must occur prior to the action being taken.

The Supreme Court tells us that the underlying purpose of the duty to consult and accommodate is to advance reconciliation in the relationship between Aboriginal peoples and the Crown.

The Supreme Court has told us that consultation that excludes any form of accommodation from the outset is meaningless.¹ This means that the Crown must enter the consultation process with an eye to determining how it may address the Aboriginal party’s concerns. Consultation must consist of more than providing an opportunity to blow off steam, and should be aimed at listening, considering solutions to minimize impacts on rights, and possibly changing the government’s planned actions or authorizations.

The duty is much more than an airing of concerns before the Crown ultimately makes a decision that infringes or affects Aboriginal and treaty rights, and requires that the perspectives and concerns of Aboriginal peoples are actually taken into account.

What is the Source of the Duty to Consult?

The source of the duty is in the honour of the Crown. The Crown must act honourably in its dealings with Aboriginal peoples. The honour requires that any rights that are protected, or

potentially protected, by section 35 of the Constitution are “determined recognized and respected.”

The honour of the Crown is always at stake because the Crown is essentially in conflict as it plays the roles of both the party making a decision which may negatively impact on Aboriginal peoples’ interest and rights, and the party charged with protecting and respecting those rights under the Constitution. Acting honourably dictates that the Crown must always fulfill its promises to Aboriginal peoples, and it must not engage in sharp dealing with Aboriginal peoples.

How Much Consultation and Accommodation is Required?

The level and content of consultation and accommodation operates on a spectrum and depends on the strength of the asserted claim to Aboriginal rights, and on the extent to which the proposed decision or activity will potentially harm those existing or asserted rights.

For instance, where there is a very strong claim or a proven Aboriginal right, and serious potential effects on those rights, the Crown may have to make substantial changes to its proposed actions.