Consultation at the high end of the spectrum: a primer

The Crown's duty to consult and accommodate arises whenever it contemplates a project that it knows or should know could impact Aboriginal rights, treaty rights or Aboriginal title. The duty exists on a spectrum. This post is about the higher end of that spectrum – what the courts have called "deep consultation." When does the Crown have a duty to engage in "deep consultation", and what does the Crown have to do to meet that standard?

What kind of cases require deep consultation?

The extent of consultation and accommodation required in a given case depends on the strength of the claim to an Aboriginal right, treaty right or title and the seriousness of the impact on the right that the proposed project will have (*Haida Nation v British Columbia*, 2004 SCC 73 at paras 39). A strong Aboriginal rights claim with good evidence, an established treaty right, or a right that has been proven in court will require more extensive consultation. If the project will likely have a serious impact on the right asserted, or if it is likely to give rise to damage that cannot be compensated for by money, then more extensive consultation will also be required.

What does deep consultation look like?

The Supreme Court of Canada has said that deep consultation will typically include the following elements:

- Meaningful and accessible information about the project: *Information about a project should come in a form that is useful and digestible to the Indigenous community affected. For instance, where community members speak their Indigenous language, translation of the project materials into that language may be required.*
- Formal participation in the decision making process: *This will usually include the opportunity to submit evidence and make submissions about the impacts of the project.*
- Funding to enable the participation of the Indigenous community in the decision-making process: *Without adequate funding, it can be difficult for a community to participate meaningfully in the decision-making process.*
- Written reasons to show how Aboriginal concerns were considered and the impact they had on the decision. *This should include a specific assessment of the impact of the project on the asserted right, not just a consideration of the environmental impacts of a project generally.*

See, generally, *Hamlet of Clyde River v Petroleum Geo-Services Inc,* 2017 SCC 40 at paras 47-52.

This is not a rigid checklist, however. A reviewing court will look at each case on its facts to determine whether the standard of "deep consultation" is met. The overarching requirement is to engage in a meaningful process of consultation that attempts to substantially address Indigenous concerns about the project. Simply providing a forum for an Indigenous community to air their concerns, or to exchange information about the project is not deep consultation. Nor is it acceptable if consultation begins from the premise that no accommodation can be made to address Indigenous concerns (*Haida Nation,* paras 42, 44; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para 55). In other words, reasonable

accommodations to address Indigenous concerns should be made as part of the consultation process.

Where can deep consultation happen?

The Crown can rely on a tribunal or other decision-making body, like the National Energy Board, to fulfill the duty to consult, even in cases where deep consultation is required. However, this will only be appropriate where the statute that creates that tribunal gives it the powers it needs to provide meaningful consultation and accommodation to Indigenous communities. This has to include 1) the procedural powers to give Indigenous communities a meaningful voice in the decision-making process; and 2) the remedial powers to order appropriate accommodations of Indigenous concerns (*Hamlet of Clyde River*, at paras 30-34).

What about consent?

Canadian law has said consent to a project is required where the Indigenous community holds Aboriginal title to the land on which that project is proposed (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para 76). But so far in Canadian law, even Aboriginal title doesn't give Indigenous communities complete "veto" to stop a project. A government can still proceed without consent if can "justify" its infringement of Aboriginal title on the standard set by section 35 of the *Constitution Act*, 1982.