Duty to Consult

By Magnolia Unka-Wool
(Presented by Ayanna Ferdinand Catlyn in Magnolia’s absence)

I have been asked to provide an update on the government’s fiduciary duty to consult with and accommodate Aboriginal peoples when proposed developments have the potential to adversely affect their constitutionally-protected rights. Specifically, how does the government’s intent to adopt the United Nations Declaration affect the duty to consult Aboriginal peoples?

In this presentation, I will attempt to answer the following 6 questions:

1. What are the challenges in duty to consult processes experienced by those involved (Aboriginal peoples, business, and government)?
2. Did the Supreme Court of Canada in *Tsilhqot’in Nation v British Columbia* decision make the obligations/process surrounding the duty to consult clearer? If so, how? If not, why?
3. Has this decision changed the way business, Aboriginal peoples and government approach to consulting with Aboriginal peoples/participating in the process? If so, how? If not, how should it?
4. What, if any, impact should or will the Truth and Reconciliation Commission’s Recommendation 92 have on business’ approach to the duty to consult process?
5. Are there legislative, policy or institutional/structural changes the federal government could make to clarify the duty to consult process for business and Aboriginal peoples and/or improve relationship building between them?
6. What are the implications (positive and negative) of codifying the obligations of the duty to consult in federal legislation?

**Background on Duty to Consult**

Aboriginal peoples, which include Indian, Inuit and Metis, in Canada possess legally binding Aboriginal and treaty rights. In 1982, Aboriginal and treaty rights were recognized and entrenched in section 35 of the *Constitution Act*. Aboriginal rights include a range of cultural, social, political and economic rights. More specifically, Aboriginal rights include the right to land, to make treaties, and to hunt, fish, and practice traditions.

The seminal Supreme Court of Canada 2004 decision *Haida v. British Columbia* 2004 SCC 73, [2004] 3 SCR 511 (“*Haida*”) first explicitly enunciated the foundational principles of the duty and provided a framework for consultation. Its purpose is to govern the relationship
between the Crown and Aboriginal peoples, while providing a framework intended to facilitate and encourage negotiation between the parties. At the heart of truly meaningful consultation and negotiation lies the overarching goal of reconciliation for the historical wrongs suffered by Aboriginal peoples in Canada.

The duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honor of the Crown, which is always at stake in dealings with Aboriginal peoples, and will give rise to different duties in different circumstances creating a fiduciary relationship. The honor of the Crown requires that the Crown: act in good faith; provide meaningful consultation appropriate to the circumstances; act with the intention of substantially addressing the concerns of the affected Aboriginal group; and have regard to the procedural safeguards of natural justice mandated by administrative law. Accordingly, the Crown is required to act in the Aboriginal group’s best interests when exercising its discretionary control over the subject of rights or title.

The duty to consult and accommodate is triggered when the Crown has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect it. This duty exists throughout the Northwest Territories as the North is almost entirely comprised of Treaty 8 and 11 Territories engaging treaties rights all over the territory. Also the NWT has 4 Comprehensive Land Claims and/or self-government agreements which have been finalized including the Gwich’in signed in 1992; the Sahtu Dene and Metis signed in 1993; the Tlicho signed in 2005; the Deline signed last February 2015. Agreements currently under negotiation in the NWT include the Dehcho First Nation; the Akaitcho First Nation; the Metis Nation; and the Inuvialuit.

The duty to consult is not a duty to reach an agreement, but is rather a commitment to engage in a meaningful consultation process. The duty to consult falls on a spectrum. The Crown will only have a limited duty to consult where: the claim to Aboriginal title is weak; the Aboriginal right at issue is limited; or the potential of infringement on the title or right is minor. In such circumstances, the duty of the Crown may be limited to mere notice, and would require, at minimum, a disclosure of information and a discussion of issues raised in response to the notice.

A more intensive level of consultation will be required in certain instances such as where the claim to Aboriginal title or rights is established (as is the case in the NWT); the right and potential infringement is of high significance to Aboriginal peoples; and the risk of causing non-compensable damage is high. Where such circumstances exist, the Crown is required to do 5 things:

1) engage in deep consultation with an aim to finding a satisfactory interim solution;
2) give an opportunity to Aboriginal peoples to make submissions to the decision maker for consideration;
3) participate in a formal decision making process;
4) provide written reasons for any decision made to show that Aboriginal concerns were considered and to reveal the impact they had on the decision; and
5) in difficult cases, consider adopting dispute resolution procedures with impartial decision makers.
1. What are the challenges in duty to consult processes experienced by those involved (Aboriginal peoples, business, and government)?

In addition to the growing trend that industry participates in consultation, there has been an increasing trend by the federal, provincial and territorial governments to delegate more and more responsibility and jurisdiction to lower levels of government and industry. This can result in a deterioration of the relationship between the Crown and Aboriginal peoples, a reduction in the potential scope of consultation and accommodations, and confusion as to who carries the obligation to consult in the first place.

In *Haida*, the Supreme Court of Canada confirmed that the legal duty to consult and accommodate lies with the Crown, and cannot be delegated to third parties. However, in *Haida* the Supreme Court of Canada held that the Crown may delegate procedural aspects of the consultation to “industry proponents seeking a particular development,” such as some of the businesses here today. Notwithstanding the limitations on delegation to third parties, third parties will additionally continue to be held liable to Aboriginal peoples if they act negligently, breach a duty of care, deal in bad faith or dishonestly, or breach contracts with Aboriginal peoples.

In the Supreme Court of Canada 2010 decision *Rio Tinto Alcan Ltd v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para 55 (“Rio Tinto”) the court confirmed that tribunals are also permitted to engage in consultation, depending always on, and confined to, the duties and powers that the legislature has conferred upon it. Tribunals may be delegated the duty of consultation directly. They may also be engaged to determine whether adequate Crown consultation has taken place to discharge the Crown’s duty. A tribunal may be given the power to engage in either of these roles, both, or neither.

All of this to say that in many projects, as a result of delegation, the federal Crown, provincial Crown, tribunals, regulatory boards, proponents and possibly municipalities could be participating in a consultation process. While this has the potential to enhance consultation, it arguably creates more concerns and confusion. Delegation can result in the loss of nation-to-nation negotiation creating a disconnect between the Crown and Aboriginal peoples. This is contrary to the advancement of the goals of reconciliation.

Delegation also poses a threat of a reduction of the scope and range of accommodations that can be made in response to consultation. Many of the entities described above often view themselves as limited to act with regard to accommodations, resulting in less meaningful consultation. Delegation is not a straightforward analysis leading to confusion as to who carries the obligation to consult and determining who holds the duty and what the scope of their involvement is. Where multiple actors are involved, the Aboriginal group may not be aware of which discussions amount to true consultation for the purpose of the duty to consult. All of the potential for confusion again leads to less meaningful consultation which compromises reconciliation in the long run.

Where meaningful consultation occurs and a project is approved for completion, there is a risk that over time, expansions and the addition of further projects on the same lands could have the cumulative effect of eroding the rights and title that consultation was aiming to protect in the first instance. Where resources are lacking, and the Crown exercises its
inherent powers to proceed with projects absent consent, Aboriginal people may have “no choice but to stand by and watch as their rights and interests that exist on traditional lands are destroyed”.

Implicit in the duty to consult framework is a significant power imbalance between the Crown and the Aboriginal peoples. Only where Aboriginal title has been established does the framework require consent from the Aboriginal title holders before a proposed project or activity can proceed. Even if the Crown is able to satisfy the requirements of the justification test (which I will explain in detail shortly) the Aboriginal rights to control the land can be overridden. There is no duty to reach an agreement; the only commitment is to the process. Again, this is at odds with the purposes of meaningful consultation and reconciliation.

2. Did the Supreme Court of Canada in Tsilhqot’in Nation v British Columbia decision make the obligations/process surrounding the duty to consult clearer? If so, how? If not, why?

3. Has this decision changed the way business, Aboriginal peoples and government approach to consulting with Aboriginal peoples/participating in the process? If so, how? If not, how should it?

The landmark Supreme Court of Canada 2014 decision Xeni Gwet’in First Nations (Tsilhqot’in) v British Columbia 2014 SCC 44, [2014] 2 SCR 257 (“Tsilhqot’in”) affirmed Aboriginal title in Canada for the first time. While the main thrust of the decision is focused on establishing Aboriginal title, the Supreme Court of Canada also engaged in a discussion and expansion of the Crown’s duty to consult. The Supreme Court of Canada confirmed that the duty to consult will be strongest where Aboriginal title has been established such is the case in the North. Where Aboriginal title is proven, Aboriginal title holders are granted the right to control the land. Consequently, where governments and others seek to use the land, consent of the Aboriginal title holders is required. If the Aboriginal peoples do not consent to the use, “the government’s only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the Constitution Act”.

This justification test was defined by the Supreme Court of Canada, requiring that where a government seeks to justify overriding the wishes of the Aboriginal peoples, it must show:

1. that it discharged its procedural duty to consult and accommodate;
2. that its actions were backed by a compelling and substantial objective, considered from the perspective of the Aboriginal group and the broader public; and
3. that the governmental action is consistent with the Crown’s fiduciary obligation to the group.

This decision has not changed the practical manner in which consultation occurs, it simply reiterates the requirements of consultation generally, and confirms how consultation is to occur where Aboriginal title is established. Where title is established, and consent is not obtained, the Crown may still be able to proceed with the proposed project or activity subject to the justification test outlined above.
4. What, if any, impact should or will the Truth and Reconciliation Commission’s Recommendation 92 have on business’ approach to the duty to consult process

Truth and Reconciliation Commission of Canada: Call to Action 92

“We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) as a reconciliation framework and to apply its principles, norms, and standards to the corporate policy and core operational activities involving Indigenous Peoples and their lands and resources. This would include, but not limited to, the following:

i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior and informed consent of Indigenous peoples before proceeding with economic development projects.

ii. Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.

iii. Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the UNDRIP, Treaties and Aboriginal rights, Indigenous Law, and Aboriginal-Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and ant-racism.”

The United Nations Declaration on the Rights of Indigenous Peoples (the “Declaration”), adopted in 2007 as a General Assembly Declaration, is not a legally binding instrument under international law. The goal of the Declaration is to encourage countries to work alongside indigenous peoples to solve global issues.

Under the previous Conservative government, Canada opposed signing the Declaration in 2007, despite being involved in drafting the Declaration for many years. Canada, the United States, Australia and New Zealand all opposed signing, citing concerns that “free, prior and informed consent” could create a veto power for Aboriginal people that is not otherwise granted in the common law. In 2010, Canada issued a statement of support for the Declaration, endorsing it as an aspirational document only. The statement stresses that the Declaration is not legally binding, is not a reflection of customary international law and does not change Canadian law on Aboriginal issues.

In 2015, the new federal government committed to implementing the Declaration in Canada. The Mandate Letter to Dr. Carolyn Bennett, Minister of Indigenous and Northern Affairs Canada, directs the implementation of the recommendations of the Truth and Reconciliation Commission and the Declaration. Concerns have been raised as to how this could be interpreted, citing again the possibility of creating a veto right against resource development and administrative and legislative decision-making by Aboriginal people. It is unclear whether the implementation of the Declaration will result in changes to the current framework, or whether it can be implemented within the existing framework. It also remains to be seen what method of implementation will be used by the government, whether through a policy framework approach, changes to existing legislation, or the adoption of new legislation.
The concept of free, prior and informed consent, a prominent feature of the Declaration, creates the greatest concerns for industry, for business in Canada. It is not clear that the concept aligns with the law that has evolved in Canada outlining the duty to consult and accommodate with Aboriginal peoples. Free, prior and informed consent, as it pertains to industry, is referenced in the several Articles of the Declaration:

Article 32(2): States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Article 28(1): Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Article 29(2): States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The concept of free, prior and informed consent arguably goes beyond the requirements of the duty to consult, which is currently limited to obtaining consent only where Aboriginal title has been established. Even in Tsilhqot’ín, the Supreme Court of Canada still provided a relief valve that allows the Crown to proceed without consent in the case of established Aboriginal title where the justification test is met.

Based on approaches taken by other Countries, and approaches in international court decisions, free, prior and informed consent has generally been interpreted as an objective to be aimed for in a process of consultation, rather than creating a veto right.

In 2014 the United Nations Inter-Parliamentary Union released a handbook for Parliamentarians providing guidance in implementing the Declaration. The handbook states that in limited circumstances, a right of veto may be appropriate under free, prior and informed consent, such as where consent is legally mandated; where Aboriginal peoples are subject to relocation; where storage or disposal of toxic waste is planned on Aboriginal lands or territories; or where actions will have a significant and direct impact on their lives or territories.

It is yet to be determined how the concept will be adopted by the Canadian courts and legislature. It would be consistent with the current constitutional and legal framework with regard to the duty to consult and accommodate to adopt the concept as an objective of consultation and participation, rather than a veto right. It will have to be decided what efforts
must be made to obtain consent, what situations would require consent over consultation, and how the justification test from Tsilhqot’in will be reconciled.

Canada could choose to adopt or reject certain parts of the Declaration which would facilitate consistency with Canada’s current policies and laws. Also free, prior and informed consent could be adopted as provided by the guidance paper allowing a veto right in certain limited circumstances but adopting the Supreme Court of Canada’s justification test.

5. Are there legislative, policy or institutional/structural changes the federal government could make to clarify the duty to consult process for business and Aboriginal peoples and/or improve relationship building between them?

6. What are the implications (positive and negative) of codifying the obligations of the duty to consult in federal legislation?

It is yet to be seen how the current Liberal government will address these concerns. The government may produce a policy paper in the area, outlining their intentions regarding implementation of the Declaration. Whether the Declaration will be seen as an aspirational or legal document is a question to be answered once more information comes available. If the intention of the government is to implement the Declaration through entrenchment in the Constitution, significant legislative amendments will be required to a multitude of statutes and regulations throughout the country. This would be a lengthy process requiring the involvement and input of government, industry participants and Aboriginal peoples.

In the NWT we have the Mackenzie Valley Resource Management Act (S.C. 1998, c. 25) (the “Act”) and the Mackenzie Valley Land Use Regulations (SOR/98-429) (the “Regulations”) and 4 Land and Water Boards (the Gwich’in, the Sahtu, the Wek’eezhii, and the Mackenzie Valley). The Land and Water boards provide the regulatory regime in the NWT for consultation through:

1) integration and coordination, and
2) co-management of resources between governments and Aboriginal groups.

Specifically, the boards regulate the use of land and water, and the deposit of waste, through the issuance and management of Land Use Permits and Water Licences. The management of the Boards extends to the areas where land claims negotiations are still taking place therefore the NWT is regulated by the Act. All lands within the Mackenzie Valley including Crown Lands, Territorial lands, municipal lands, private lands, are subject to the Act and Regulations.

Land use permits include, but are not limited to: Use of explosives; use of vehicles; drilling; hydraulic prospecting; earth moving and clearing; campsites; fuels caches; and preparation or lines, trails, or right of ways.

The Act has created and provided authorities to co-management boards to carry out land use planning, regulate the use of land and water and, if required conduct environmental assessments and reviews of large or complex projects.
The Act makes it abundantly clear that residents and communities in the Northwest Territories, particularly Aboriginal peoples, play a pivotal role in the regulatory system established under the legislation. The principal goals and objectives of the Act include:

a) enabling residents of the Mackenzie Valley to participate in the management of its resources (Section 9.1);

b) ensuring that the concerns of Aboriginal people and the general public are taken into account in the environmental impact assessment process (Section 114(c));

c) protecting the social, cultural and economic well-being of residents and communities in the Mackenzie Valley (Section 115(b)); and

d) recognizing the importance of conservation to the well-being and way of life of the Aboriginal peoples who use an area of the Mackenzie Valley (Section 115 (c)).

In 2008 the NWT the MVLWB established the Standard Procedures and Consistency Working Groups to develop consistent policy, procedures and guidelines that take into account regional differences. The working groups are comprised of staff from all Boards.

**Conclusion: In Summary, the very practical takeaways for business are:**

1) **Adequate consultation:** The communities need information provided on the proposal by the industry proponent at a very early stage and it has to be in a format that is readily understandable. The information should be provided in a written form initially and a follow up in-person presentation should be arranged in consultation with the community. Depending on the complexity of the project and the overall effect on the community there should be discussion with the leadership to determine if a wider audience in the community is warranted. Government can also play a role in the dissemination of information. There is no increased exposure to Business if they proceed on a reasonable and principled approach. The timing of the consultation is left with them and they should undertake the work in consultation with the community in question. Working in concert with the community goes a long way to understanding and acceptance.

2) **Degree and Form of Consent:** Co-operation with the community and receipt of a final letter of support is the anticipated response. Again, involving the community at an early stage gets them to 'buy in' to the project. There has to be something in it for them. On larger projects this involves the negotiation and completion of Access and Benefit types of Agreements. These agreements provide access to jobs, training and business opportunities. The communities are looking to gain long-term sustainable benefits as a direct result of the proposed project.

3) **Legal Challenge:** Should this type of meaningful consultation happen and a respectful relationship is maintained with the community leaders the process should withstand legal scrutiny.

By Magnolia Unka-Wool, Field Law Yellowknife Office