

what is the duty to consult, anyway, and why is it important?

the importance of consulting with aboriginal peoples

Mining and energy companies exploring and operating in Canada will at some time find themselves developing or needing to develop relationships with Aboriginal peoples. The strength and effectiveness of these relationships can have a critical impact on project development timelines, structure, and even whether some projects are ever commenced or completed.

Industry relationships with Aboriginal peoples are complex, requiring delicate sets of communication and negotiation to bridge cultural differences – differences that influence, among other things, social norms and perceptions of value. Just one of many important dynamics part of Aboriginal culture (indeed, almost any culture) is a striving for a meaningful say in the destinies of their communities and ways of life. This objective includes a measure of political self-determination, but also an element of obtaining a fair share of the economic pie.

Through a trilogy of cases, *Haida*, *Mikisew*, and *Taku River*, the Supreme Court of Canada has assisted Aboriginal peoples in protecting and developing their communities and ways of life by requiring the Crown to consult with Aboriginal peoples whenever the Crown's actions may impact a potential Aboriginal right or title interest – rights and interests recognized and affirmed by section 35 of the Constitution.

This duty to consult, at law, applies only to the Crown. However, industry has at least as much at stake as the Crown in ensuring that a meaningful, effective consultation process is performed where Aboriginal rights or title interests are impugned.¹ Resource development and infrastructure projects generally require government approvals and licensing. Projects on lands where the duty to consult has been engaged can be drawn to a halt or even close where no consultation has been performed or where consultation processes remain on-going.

¹ Indeed, with the proposed changes to the *Mining Act* (Ontario) (i.e., Bill 173), the Ontario government seeks to require private companies to also consult with Aboriginal peoples when seeking exploration permits, conducting advanced exploration, obtaining mine production approvals, and performing mine rehabilitation (see sections 2, 78.1(1), 78.2(2), 139.2(4.1), 140 and 141).

Industry is therefore best served by getting involved in shaping the consultation process to minimize harm to projects and uncertainty. Viewed positively, the duty to consult is capable of creating strong relationships and partnerships amongst industry, Aboriginal peoples, and the Crown as these parties are brought into a dialogue through which the impact of development and other forces of change affecting Aboriginal peoples and their ways of life can be managed successfully.

the legal framework

Where does the duty come from?

The duty to consult is grounded in the “honour of the Crown”, which is an obligation flowing from the Crown’s assumption of sovereignty over lands and resources formerly held by Aboriginal peoples, who, historically, were never conquered. Accordingly, the duty to consult rests with the Crown alone and, save for procedural elements of a consultation process, may not be delegated to third parties.

When does the duty arise?

The Crown’s duty is triggered when it has real or constructive knowledge of the potential existence of an Aboriginal right or title interest *and* the Crown contemplates conduct that may adversely affect the potential right or title interest. Although the duty to consult is triggered at a low threshold, potential rights or title interests must ultimately be established on the evidence. The process of doing so often requires historical, archaeological, and other expert social analyses and can become intensive for all concerned parties.

How much and what kind of consultation is required?

The kind of consultation required in any given circumstance varies. Consultation must be proportionate to the strength of the case supporting the asserted Aboriginal right or title interest and the seriousness of the potentially adverse effect upon the right or title claimed. In some cases where a claim to title is weak, an Aboriginal right limited, or potential infringement minor, notice of the Crown initiative, together with the disclosure of information and response to questions raised, may be sufficient to discharge the duty. Where the contrary is the case, “deep consultation” may be required – opportunities to make submissions for consideration, formal participation in the decision-making process, and written reasons addressing Aboriginal peoples’ concerns are some of the more intensive measures that have been identified. As the Supreme Court has put it, “[t]he controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.”

Is agreement required?

There is no obligation to reach an agreement – although, in some cases, accommodation of Aboriginal peoples’ interests may be required. Hard bargaining is permissible, but both the Crown and Aboriginal peoples must bargain in good faith.

concluding thoughts

Understanding consultation obligations and implementing the correct process early and through respectful engagement are essential to the success of many mining and energy projects – these items are becoming increasingly critical. Besides seeking to amend legislation, as referenced above, Canadian governments and ministries have started to draft and implement consultation guidelines for Aboriginal peoples. For example, the initiative of the Ministry of Northern Development and Mines to modernize the *Mining Act* included a commitment and a process was implemented to “ensure appropriate consultation and accommodation of First Nation and Métis communities”. Many companies like SNC-Lavalin have started to formalize consultation processes with Aboriginal peoples in support of large scale engineering and construction projects. Courts continue to develop the law of consultation. The level of sophistication of all involved parties is increasing.

With the correct approach to consultation, mining and energy companies will be well positioned to foster important relationships and partnerships with the Crown and Aboriginal peoples, while continuing to explore and operate successfully throughout Canada.

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a cautionary note

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