Delegation, Deference, and Difference: Searching for a principled approach to implementing and administering Aboriginal rights

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Plan for the presentation

1. The duty to consult & accommodate and who can carry it out
2. *Clyde River* & *Chippewas of the Thames* – Key issues considered at the SCC
3. Critique and comments

Source & Purpose of the Duty to Consult and Accommodate (DTCA)

Source:

- The Honour of the Crown

Purpose:

- Preserves aboriginal interest pending a more final resolution of rights claims *(Haida Nation,* paras 27, 33)
- Reconciliation:

  "Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people." (*Haida Nation,* at para 32)

Framework: 3 steps

1. Is there a duty to consult? (trigger or threshold question)
   - Easy to meet: "the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida Nation*, para 32)
2. What is the content of the duty? (scope of the duty)
   - A spectrum: "the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed." (*Haida Nation*, para 39)
3. And has that duty been met? Was consultation adequate? (how the duty to was carried out, subject to a reasonableness standard on judicial review)

Framework: Step 1

1. Is there a duty? *Carrier Sekani Tribal Council v Rio Tinto Alcan,* 2010 SCC 53 identified 3 trigger elements:
    1. The Crown has *real or constructive knowledge* of the potential existence of an aboriginal right. "Credible claim" standard.
        - Includes unproven rights, historic and modern treaty rights
    2. The Crown contemplates (NEW) *conduct*
        - Includes regulatory decisions (*Chippewas of the Thames*)
        - Does it apply to "legislative" decisions? Stay tuned: *Courtoreille v Canada (Aboriginal Affairs),* heard by SCC in January 2018
    3. With (NEW) *potential adverse affects*
        - Includes "strategic" and planning decisions; excludes decisions with only a speculative impact on rights
        - Can be an aggravation of historic impacts, but historic impacts alone won't trigger the duty.
        - Even if historic impacts don't trigger the duty, they can be part of the conversation in consultation where there is new impacts to trigger the duty (*Chippewas of the Thames,* at paras 41-42)

Framework: Step 2

2. What is the content of the duty?

- Depends on all of the circumstances. At lower end of the spectrum, the duty may require:
  - Notice, reasonable opportunity to present vies on the matter, and full and fair consideration of those views by government actor (e.g., *Beckman v Little Salmon/Carmacks First Nation,* 2010 SCC 53 at paras 74-75)
- At the higher end of the spectrum (”deep” obligations), content may require :
  - An “opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered to reveal the impact they had on the decision” (*Haida Nation*, at para 44)
  - Accommodation: “addressing the Aboriginal concerns [revealed by consultation] may require taking steps to avoid irreparable harm or to minimize the effects of infringement.”(*Haida Nation* at para 47)
  - Where accommodation is required in relation to unproven rights, the “Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.” (*Haida Nation, at* para 50)
  - With respect to Aboriginal title/strong claim of – consent? (*Tsilhqot’in Nation*)
  - UNDRIP??

Framework: Step 3

3. Has the duty been met? Was consultation adequate?

"[G]ood faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised … through a meaningful process of consultation… [T]here is no duty to agree; rather, the commitment is to a meaningful process of consultation." (*Haida Nation,* para 42)

Quality of the conversation is key: In *Clyde River*, the Supreme Court commented on a 3,926 page document posted online by the proponent in response to Inuit questions about the impact of the proposed seismic testing on marine mammals:

> Internet speed is slow in Nunavut…and bandwidth is expensive. The former mayor of Clyde River deposed that he was unable to download this document because it was too large. Furthermore, only a fraction of this enormous document was translated in Inuktitut. To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation. (at para 49)

Framework: Who carries out the duty to consult? Can the duty be delegated?

Not to third parties, but "[t]he Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development… However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. **The honour of the Crown cannot be delegated**." (*Haida Nation,* para 53, emphasis added)

"It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts." (*Haida Nation*, at para 51).

→ administrative delegations are different than delegations to third parties

Framework: Delegation in *Carrier Sekani Tribal Council v Rio Tinto Alcan*, 2010 SCC 53

Set up 2 possible types of jurisdiction over the DTC&A:

1. *"*[T]he legislature may choose to **confine a tribunal's power to determinations of whether adequate consultation has taken place**, as a condition of its statutory decision-making process." (at para 57)
   - Authority depends on whether tribunal has express or implied authority over questions of law

And/or

2. "**The power to engage in consultation itself**, [which is] distinct from the jurisdiction to determine whether a duty to consult exists... Consultation itself is not a question of law…. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation." (at para 82)

Clyde River and Chippewas of the Thames

What the cases decided (or didn't decide)…

Clyde River (Hamlet) v Petroleum Geo-Services, 2017 SCC 40, [2017] 1 SCR 1069 [*Clyde River*] and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 SCR 1099 [*Chippewas of the Thames*]

<u>Key points of contention:</u>

1. Who is responsible for discharging the duty to consult Indigenous peoples and assessing the adequacy of the consultation, particularly when the regulatory process places the final decision for a project approval in the hands of a regulatory agency and not the crown "proper" (understood as a minister of the crown or cabinet)? In other words, can the duty be satisfied without the Crown participating in the process and making decisions about its adequacy?

   The Court's answer: "While the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty." (*Clyde River* at para 1 and 30; *Chippewas of the Thames* at para 1).

   The Crown may *rely* on a regulatory agency in this way so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances (*Chippewas of the Thames* at para 32, emphasis added).

What the cases decided (or didn't decide)…

2. When responsibility sits with a regulatory agency to assess the adequacy of consult, must the agency conduct a *"Haida Nation*" analysis to fulfil its obligations? In other words, does a preliminary analysis of the strength of rights claimed have to be conducted and, presumably, communicated to the claimant? What is the degree of specificity with which the existing or claimed aboriginal or treaty rights must be treated for the duty to be discharged?

The Court's answer: An agency will not "always [be] required to review the adequacy of Crown consultation by applying a formulaic '*Haida* analysis'…. Nor will explicit reasons be required in every case. The degree of consideration that is appropriate will depend on the circumstances of each case." (*Clyde River* at para 42).

"Where deep consultation is required [the agency] will be obliged to "explain how it considered and addressed" Indigenous concerns (*ibid.*). What is necessary is an indication that the [agency] took the asserted Aboriginal and treaty rights into consideration and accommodated them where appropriate" (*Chippewas of the Thames* at para 63).

Why is this issue of delegation/reliance important?

These issues address how Aboriginal rights are implemented and administered throughout government (i.e., including administrative agencies).

- Should Aboriginal rights be treated the same way as Charter rights? Why not? What principles justify different treatment in public law?
- When, where and how do Aboriginal rights get adjudicated? How does adjudication of rights become accessible? What is the role of judicial review and courts more generally?

They also go to the conceptualization of the Indigenous-state relationship, particularly in the context of a pre-proof or pre-settlement of rights claims, and absent agreements on the protection and administration of rights through regulatory bodies:

Nation-to-Nation relationships, treaties with the *Crown* and not regulatory bodies:

- Myeegun Henry, Toronto Star, "The Supreme Court's ruling allows the Canadian government to delegate a nation-to-nation relationship to resource companies who are now empowered to determine the potential impacts of our nation's constitutionally protected rights without any direct Crown involvement."

Recall - the DTC&A responds to the (unique) starting point for Aboriginal rights

Aboriginal Rights:

- Claimants must prove that their rights exist before the rights are treated as rights. The DTC&A allows for implementation of *something* prior to proof/agreement on existence and scope.
- *Tsilhqot'in Nation* confirms that the onus on the Crown with respect to the DTC&A is different before and after proof (where it forms part of the justification analysis).
- Role of administrative agencies? What does it mean to be bound by "unproven" rights? What does reconciliation require?

Contrast Charter Rights:

- Claimants are assumed to have Charter rights. Tests address the scope and application of those rights and the justification of infringements in particular cases.
- Administrative agencies are bound to respect the Charter, have jurisdiction to consider Charter questions (with jurisdiction over questions of law), and are owed deference with respect to administrative decisions that implicate Charter rights and values.

Comments and Critiques – Main arguments:

1. “Reliance” rather than delegation undermines the premises of deference to tribunals while reinforcing/augmenting factors that suggest deference to the Crown (a s. 35 “difference” relative to administrative law and delegation of constitutional jurisdictions and responsibilities). This is problematic, raising Crown policy and discretion “above” legislation. However, it also interestingly signals the unsettled nature of Indigenous rights and nascent or still forming nature of Crown sovereignty.

2. Explicit treatment of the strength of the rights claims is critical to the duty to consult and its ability to serve reconciliation purposes. If tribunals are not required to treat rights explicitly, courts must address such “gaps” on JR. (more s. 35 differences, particularly in relation to evolving law on review of decisions implicating/ breaching Charter rights – (*Doré v Barreau du Québec,* 2012 SCC 12; *Loyola High School v Quebec (AG)*, 2015 SCC 12)

1. Reliance rather than delegation

Critique and comments

The non-delegable quality of Crown responsibility

"The honour of the Crown cannot be delegated." (*Haida Nation,* at para 53)

- Stated in relation to determining that third parties (Weyerhaeuser) was not responsible for the duty.

In 2017 becomes: "While the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility **for ensuring consultation is adequate**." (*Clyde River* at para 22, emphasis added; see also *Chippewas of the Thames* at para 37)

- Adds a constitutional restriction that does not permit full and final authority on the question of adequacy to be delegated to tribunals.

Legislative intent and deference

Crown responsibility for adequacy – an assessment that attracts deference on JR:

- *Gitxaala Nation*, the majority reasons of the Federal Court of Appeal: "When considering whether that duty has been fulfilled—*i.e.*, the adequacy of consultation—we are not to insist on a standard of perfection; rather, only reasonable satisfaction is required." (at para 8)

Proposition: A legislature cannot intend a tribunal to be the expert on a matter that they are constitutional restricted from fully or finally delegating to the tribunal.

Proposition #2: If a legislature cannot intend to make a tribunal an expert on the constitutional question of adequacy of consultation, then courts should not defer to tribunal assessments of adequacy.

- But deference should still apply to Crown assessments of adequacy????

So….?

- The point of the argument is that reliance is really different from delegation rather than that the 2017 cases effected this change or that courts should change the approach to standard of review. The Court did not discuss standard of review in these cases. At all.

- However, the Indigenous parties' arguments that the Crown must be involved in consultation echoes this argument of a *structural* requirement of correctness review of tribunals. Reliance rather than delegation demonstrates that structurally, Aboriginal rights are not ripe for implementation yet.
  - foreshadows the next argument, in regards to protecting the "rights" quality of s. 35 rights.

2. Is the conversation still about rights?

A "formulaic" Haida *analysis is not required*

- *Haida Nation* meets *Doré/Loyola* (and *Newfoundland & Labrador Nurses Union* too)
  - A parallel path to the Charter instead of a path of Indigenous difference?

- But what about the discussion in *Clyde River* that consultation must address impacts on rights and not just the environment? Does this not require an analysis of the (claimed) right?

- And what about significant case law that requires *the Crown* to conduct a preliminary assessment of the rights in order to satisfy the duty (regardless of the process) – should the cases be understood to "overrule" this line of cases? Or should the Crown's obligation in this regard be more and different from other administrative decision-makers (and who is the Crown anyway…), introducing a significant departure from the related line of Charter and administrative law cases?
  - Likely not a parallel path, and indicates that the application of principles and cases from the Charter context may not be appropriate.

Aboriginal rights are "TBD"

- One of the biggest differences between Aboriginal rights and Charter rights is that Aboriginal rights are determined on a case-by-case basis while Charter rights litigation focuses on scope and application. Charter rights exist; Aboriginal rights must be proven.

- Proposition: While the *Doré/Loyola* approach may risk watering down rights, this issue of "skipping" the articulation and assessment of the rights claimed in the s. 35 context risks avoiding ever arriving at the definition and identification of the rights.

- Further, *Clyde River* involved impacts on well defined modern treaty rights. Why was this not treated as such? Shouldn't this be an issue of *Sparrow* or *Badger* meets *Doré? i.e.,* whether and how the justification analysis in the s. 35 contexts is addressed in administrative contexts, and whether the same rationales and problems that motivated the *Doré/Loyola* framework apply?

What does a "robust" proportionality require in the context of the duty to consult?

- If *Haida Nation* must meet *Doré/Loyola,* then there needs to be some consideration of what is required to meet a high standard of rigor in the analysis, both by the tribunal and reviewing courts. The identification and preliminary assessment of rights cannot be avoided, whether in a "formulaic" *Haida* analysis or otherwise.
  - Arguable that *Clyde River* requires such an approach, at least in respect of deep consultation obligations. Complicated by the application of the principles in *Chippewas of the Thames*, in which the impact of the project on several rights claims is never treated by the NEB or the courts nor is the scope of consultation obligations ever specified.

- A rigorous approach to proportionality may open the door for judicial review to facilitate adjudication of disputes that relate to the scope of s. 35 rights.

- Additional judicial treatment of s. 35 rights would serve reconciliation; the political processes of negotiation have taken too long and are problematic (e.g., comprehensive claims, lack of forums for disputes about historic treaty rights, etc). Judicial treatment is also appropriate; these are constitutional rights at stake, not just "interests".