

Haida Nation v. British Columbia, [2004] SCC 73

Taku River Tlingit First Nation v. British Columbia
[2004] SCC 74

**Implications for
Environmental Lawyers**

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Starting Point:

- **Section 35 *Constitution Act***

- ◆ **The existing aboriginal and treaty rights are hereby recognized and affirmed**

***"R. v. Sparrow"* 1990**

- **Aboriginal Rights are not absolute**
 - ◆ **Rights can be infringed, but infringement must be justified**

Infringement

- **Is the limit unreasonable?**
- **Does it impose undue hardship?**
- **Does it deny holders of right preferred means of exercising right?**

Justification

- **Existence of valid legislative objective such as conservation management**
- **Is Honour of the Crown upheld taking into consideration:**
 - ◆ **Priority allocation of resource;**
 - ◆ **Minimal infringement of right;**
 - ◆ **In situation of expropriation, was fair compensation made; and**
 - ◆ **Was aboriginal group consulted in relation to restriction.**

Haida and *Taku* both decided:

- The Crown has a duty to consult and, in some cases, accommodate where the interests of aboriginal people may be affected by a crown action or decision.
- Asserted rights v. Proven Rights

Source of Duty to Consult: Honour of the Crown

- Crown must act honourably in order that pre-existing aboriginal societies be reconciled with Crown Sovereignty
- Does not flow from fiduciary obligation

Overview:

- **Good faith reciprocal obligation;**
- **Recognition that Crown must govern and manage competing interests;**
- **Crown duty; not industry duty;**
- **Duty is proportionate to assessment of strength of right and potential adverse effect on right or title – Spectrum of Consultation;**

Overview continued...

- **Separate process likely not required;**
- **Consult as early as possible;**
- **Consultation can occur in stages;**
- **Aboriginal groups must outline concern with clarity; and**
- **Consent not required**

Overview concluded...

Standard of Review

- **Correctness – Characterization of Claim and potential for impact**
- **Reasonableness – Assessment of consultation efforts**

Implications for Environmental Lawyers:

- **When does duty to consult arise?**
- **Freestanding duty of consultation**
- **Existence of Consultation Policy**
- **Increased Expectations:**
 - ◆ **Who?**
 - ◆ **How?**
 - ◆ **Enough?**

Implications for Environmental Lawyers – continued...

- Direct (e.g. regulate hunting/fishing)
- Indirect
 - ◆ Land management;
 - ◆ Forestry Tenure dispositions;
 - ◆ Energy Tenure dispositions;
 - ◆ Requests for capacity funding;
 - ◆ Prosecutions; and
 - ◆ On the horizon:
 - ◆ *Canada (Minister of Canadian Heritage) v. Mikisew Cree First Nation*

Questions

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