WHAT IS DUTY TO CONSULT?

The doctrine of Canadian law defines duty to consult as “governments making decisions that may have an impact on Aboriginal rights or treaty rights have a duty to consult the potentially affected Aboriginal communities even prior to final proof of the rights, in court or final settlement on the rights in negotiation processes.”

TO DETERMINE WHETHER A DUTY TO CONSULT HAS ARISEN, THE COURT WILL APPLY A THREE PART TEST. THE COURT MUST DETERMINE:

1. **DID THE GOVERNMENT HAVE REAL OR CONSTRUCTIVE KNOWLEDGE OF A CLAIM TO THE RESOURCES OR LAND IN QUESTION?**

   "Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community in an impact as rights may reasonably be anticipated."

2. **IS THE GOVERNMENT TAKING OR MAKING A DECISION THAT ENGAGES A POTENTIAL ABORIGINAL RIGHT?**

   The Supreme Court of Canada (“SCC”) has cited the following cases as examples of where a government action or decision engages a potential Aboriginal right:
   - The transfer of lands known which would permit the cutting of old-growth forest (Metal)
   - The approval of a multi-year forest-management plan for a large geographic area
   - The establishment of a review process for an new pipeline, and
   - The refusal of a corporation’s request to determine a protector’s infrastructure and capacity needs for electricity transmission

   "The duty to consult extends to ‘strategic, higher level decisions’ that may have an impact on Aboriginal values and rights.”

3. **IS THERE A POSSIBILITITY THAT THE CROWN CONDUCT MAY AFFECT THE ABORIGINAL CLAIM OR RIGHT?**

   There must be a causal relationship between the government action or decision and the potential negative impact on the right. One must be aware that this test is only for specific possible harms in the future. Past wrongs, including previous breaches of the duty to consult, will NES to the duty to consult now. Therefore, the Crown on First Nations should assert the government has a duty to consult or has been found in making that duty before the project is approved.

Delgamuukw Case. For more in-depth information on the following cases please visit the URL
Mukh Nations Case

Taku River First Nations Case

Wet’suwiet First Nations

REFERENCES

http://www.aboriginal.alberta.ca/
For more information on Aboriginal Consultations, First Nations, Treaty Rights, Yukon Claims, Land Claims and Aboriginal Economic Development please refer to the Government of Alberta’s Aboriginal Relations website

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**Call a Lawyer for Legal Advice**
CASE #1 - Delgamuukw v. British Columbia 1997
SIGNIFICANCE - THE DELGAMUUKW CASE ARGUED THE EXISTING AND CONSTITUTIONALLY PROTECTED RIGHTS OF ABORIGINAL TITLE.

The Delgamuukw case involved the Gitksan and Wet’suwet’en people of British Columbia in a claim based on Aboriginal title over their traditional land. The Gitksan and Wet’suwet’en First Nations did not sign treaties with the Canadian government and were preserving their title through the Supreme Court. The decision determined that Aboriginal title is a sub-category of Aboriginal rights and is protected by Section 35 of the Constitution Act 1982. It also established that when dealing with Crown land, the government must consult with Aboriginal peoples, especially when title is affected. Another aspect that came from this case was the duty to accommodate. This could be accomplished in a way that accommodates and accommodates. While the Crown may have a duty to accommodate, industry itself has a duty to accommodate, although it may be in the private sector. Compensation may not be a good place for Aboriginal peoples who have been impacted by industry. However, Aboriginal title must be preserved. There must be evidence that there were exclusions of occupation before European contact and substantial evidence of traditional use. It is important to note that in the Delgamuukw case, it was determined that it included an evidence.

CASE #2 - Haida Nation 2004
SIGNIFICANCE - THE ADOPTION OF THE CASE TESTS THE QUALITY OF TREATIES AND THE FAILURE TO COMPLY IS THE RIGHT OF ABORIGINAL PEOPLES TO赢得了.

The Haida Nation of the Queen Charlotte Islands of British Columbia won a case, not the first ever, over their traditional land. The government granted a logging company exclusive rights to harvest trees in an area occupied by the Haida Nation. The Haida Nation argued that there had been no consultation or accommodation, rather from the Crown over the logging company. The Supreme Court ruled that duty to consult is based on the nature of the Crown, especially when knowing that POTENTIAL, intended for Aboriginal title must be negotiated. However, the third party (logging company) does not have a duty to consult with Aboriginal peoples in the consultation process. The Haida Nation case was “determined not as much as in this relationship and the Crown’s obligations under the treaty of exclusive jurisdiction over the Haida and Aboriginal peoples, with respect to the interests affected by the government’s decision or action.”

CASE #3 - Taku River Tlingit First Nation 2004
SIGNIFICANCE - THE CASE EXAMINES THE RIGHTS OF THE TALKING’S DUTY TO THE COURT AND THE ARMOURY WITH ADDITIONAL PEOPLE.

The T. J. government granted a mining company an exploration permit a copper mine andbronze an area which would go through the Taku River Tlingit First Nation (TIPIM). The TIPIM did engage in an Environmental Assessment process for three and half years and were wrapped. The T. J. government acted in the accommodation of the majority, and because TIPIM participated in the assessment process, their concerns were considered in terms of accommodation. The courts found that the Crown did not effectively accommodate or address the TIPIM’s concerns.

CASE #4 - Mikisew Cree First Nation 2005
SIGNIFICANCE - THE COURT STATED THAT THE CROWN DESIRES A CONSENSUAL CONSULTATION PROCESS FOR THE FIRST NATION AND THAT THE PROCESS SHOULD BE CONSISTENT WITH THE LAW, AND NOT A PROCESS OF SIGNIFICANTLY MODIFYING THEIR CONDITIONS.

The Mikisew Cree of Canada Heritage applied to a waterway running through a portion of their reserve land where substantial browsing, trawling and fishing were common among the Aboriginal peoples. Parks Canada argued that there was a consultation required because of the Crown’s intention to deal with the use of the land. The Mikisew Cree argued that decision had altered their treaty duty to hunt and fish under Treaty 6. They also argued that consultation was inadequate. The Supreme Court overturned and under the decision (in the Federal Court of Appeal) ruled that the Crown did not properly consult with the Mikisew Cree. While the Crown had the right to “take action” it also had its obligation to not unreasonably, especially when it involved the treaty rights of Aboriginal peoples.

WHAT EVIDENCE SHOULD BE PUT FORWARD TO SUPPORT A CLAIM THAT THE GOVERNMENT HAS NOT ADEQUATELY CONSULTED?

In many cases, a Board or First Nation asserting that the federal or provincial government has a duty to consult sees its efforts at the tribunal or court level fail because of a lack of evidence supporting the existence of a claim or right or insufficient evidence supporting a causal connection between the government action or decision and the possible harm to the Aboriginal title or right.

While First Nations must show proof that a potential claim of Aboriginal rights exists, it does not have to show at the very beginning of the process that the potential claim will be successful. The First Nation in question must provide some proof, however, that the land affected by the government action could be the subject of a potential claim of Aboriginal title or right.

With respect to proof of a causal connection between the government action or decision and the potential harm to the Aboriginal title or right, there must be proof of something more than just a speculative impact. There must be proof of ‘deprivaion’s or a benefit on the First Nations ability to maintain their Aboriginal rights’ (CA for SOC quoted this statement from R v. Douglass, 2007 BCCA 305, 57 B.C.R. (4th) 657, at para. 64, in Carrier supra). The negative affect does not have to be inevitable. It will be enough to establish that there is a potential for future negative consequences.

Bands and First Nations should begin collecting information on where community members hunt, fish, trap or conduct any other important traditional practices if they have not already begun doing so. Such information could prove critically important in supporting an argument that the government has a duty to consult with respect to proposed activity on any land that has been traditionally used for such purposes.