

# Aboriginal Bulletin

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## The Supreme Court of Canada Decisions in *Haida* and *Taku*: The Final Word on the Duty to Consult

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On Thursday, November 18, 2004 the Supreme Court of Canada delivered its judgments in *Haida v. British Columbia*, 2004 SCC 73 and *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74. *Haida* and *Taku* were heard together by the Supreme Court of Canada on March 24 and 25, 2004. Charles F. Willms and Kevin O'Callaghan of our office appeared for a coalition of business and industry who intervened at the Supreme Court of Canada in *Haida* with respect to the issue of a third party's duty to consult.

The appeal in *Haida* by the Province was dismissed while the appeal by Weyerhaeuser was allowed. Importantly, the Court held that there was no third party duty to consult with aboriginal people in respect of asserted s. 35 rights. The appeal in *Taku* was allowed, the Court holding that the Taku Tlingit were adequately consulted in respect of the Project Certificate.

In both appeals, the Court gave guidance to the Province on the test for consultation and accommodation and circumscribed the exposition of that duty by the B.C. Court of Appeal in the judgments under appeal. In both cases the Court emphasized that the consultation process required good faith and reasonableness on

the part of the Province and aboriginal people and that the duty of consultation did not provide a veto to aboriginal people.

We set out below the key portions of the judgment along with our views on the impact of the judgment for private parties in the Province of British Columbia.

### Background

#### *Haida*

The area within Tree Farm Licence 39 ("T.F.L."), known as Block 6 is made up of several areas, all of which are located on the islands of Haida Gwaii and contains old growth forests and second growth forests. For more than 100 years, the Haida people have claimed title to all the lands and surrounding waters of the Queen Charlotte Islands. MacMillan Bloedel Limited ("MBL") was engaged in logging timber on the Queen Charlotte Islands since about the time of W.W.I, acquired T.F.L. 39 in 1961 and conducted logging operations until the transfer of its rights under T.F.L. 39 to Weyerhaeuser Company Limited in November 1999. T.F.L. 39 granted to MBL the exclusive right to harvest quantities of timber on the Queen Charlotte Islands within the areas

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collectively known as Block 6. In 1981 and 1995, the Minister offered to replace, and upon acceptance of the offer by MBL, did replace T.F.L. 39 pursuant to the procedure authorized by the Forest Act. In February 1995, the Haida Nation filed a petition challenging the validity of the replacement of T.F.L. 39 that became effective March 1, 1995. That litigation was never formally concluded. On September 1, 1999, the Minister sent to MBL an offer to replace T.F.L. 39 and on February 10, 2000, the Minister issued the replacement to Weyerhaeuser effective March 1, 2000. The three decisions of the Minister to replace T.F.L. 39, which were all complained of, were all made without the consent of the Haida Nation, and the decisions in 1995 and 2000 were made against the objections of the Haida. The Haida also objected to the transfer of T.F.L. 39 from MBL to Weyerhaeuser.

The Haida applied for a declaration that the 1981, 1995 and 2000 replacements of T.F.L. 39 relating to Block 6 were invalid and for orders quashing the replacements because the fiduciary and legal duty of the Crown to consult with the Haida had not been complied with and had been ignored. They sought to set aside the transfer of T.F.L. 39 from MBL to Weyerhaeuser and the Minister's decisions to replace T.F.L. 39 in 1981, 1995 and 2000. On November 21, 2000, the chambers judge dismissed the petition. The Court of Appeal allowed the appeal and decided that the provincial Crown and Weyerhaeuser had a duty to consult the Haida people in 1999 and 2000 about accommodating their aboriginal title and rights when consideration was given to renewal of T.F.L. 39 and Block 6. Weyerhaeuser obtained a rehearing. The Court of Appeal confirmed that the provincial Crown had in 2000, and the Crown and Weyerhaeuser have now, legally enforceable duties to the Haida people to consult with them in good faith and to seek a workable accommodation.

### ***Taku***

The Respondent, Redfern Resources Ltd. ("Redfern") proposed to reopen a mine on the Taku River system, and to construct a 160-kilometre access road to the mine through a wilderness area in Northwestern British Columbia from Atlin to Tolsequah. The area to be traversed by the proposed road was the portion of the traditional territory of the Respondent, the Taku River Tlingit First Nation (the "Tlingits"), where their traditional land use activities were most concentrated. The area is not covered by a treaty but at the relevant time, was the subject of treaty negotiations between the Tlingits and the Governments of Canada and British Columbia. Redfern's proposal to reopen the mine was subject to an environmental review process under the Environmental Assessment Act. The Project Committee undertook the statutory review process in consultation with Canadian, British Columbia and Alaska government representatives, Tlingit representatives and the public over the course of three and a half years. The Committee submitted their Recommendations Report to the Provincial Ministers, recommending that the project proceed with certain mitigation strategies to accommodate the Tlingits' concerns. The Tlingits at all times asserted their aboriginal rights and their concerns about the impact of the proposed road on their culture and habitat and on their treaty negotiations and provided their own recommendations to the Ministers in an appendix to the report. Shortly afterwards, a Project Approval Certificate was issued by the Ministry of the Environment.

The Tlingits applied for judicial review. They claimed aboriginal title to a substantial area of north western British Columbia and stated that the road would interfere with their hunting, fishing and gathering activities and with their aboriginal title. Prior to the hearing of the judicial review, an application was made for an order severing those issues raised in the petition for judicial review requiring proof of aboriginal rights or aboriginal title from the petition and referring them to the trial list.

An order to this effect was granted and leave to appeal from that order was refused by Goldie J.A. and an application to review that decision was dismissed by the Court of Appeal on September 22, 1999. A determination of the aboriginal rights and title issue has not yet proceeded.

In the judicial review proceedings, the Chambers judge found that the Ministers should have been mindful of the possibility that their decision might infringe on aboriginal rights, and that they should have been more careful to ensure that they had effectively addressed the Tlingits' concerns. The Chambers judge set aside the Ministers' decision and directed a reconsideration, requiring the Project Committee to reconvene to discuss the Tlingits' concerns and to prepare a revised draft recommendations report. This order was appealed by Redfern and the Ministers while the Tlingits cross-appealed. The majority of the Court of Appeal dismissed the Ministers' appeal on the question of whether they owed a constitutional and fiduciary duty of consultation to the Tlingits who had asserted aboriginal title.

## **Judgment of the Supreme Court of Canada, November 18, 2004**

### ***Haida***

#### **Duty of the Province**

The Court held that the Province has a duty to consult with aboriginal people, and in some cases to seek workable accommodation, when rights are asserted but not proven. It grounded that right not in the infringement analysis first explained in Sparrow but instead on the honour of the Crown. The Court said at paragraph 16:

16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*,

[1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

The Court also held that claimants "should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements." (para. 36)

Importantly, although the Court dismissed the Province's appeal, it confirmed that consultation is not a veto. The Court said at para 42 and 48:

42 At all stages, good 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 (Delgamuukw, supra, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted....

48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in

Delgamuukw is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

(emphasis added)

The Court explained a potential method by which the Province could discharge its obligations to consult at para. 51:

51 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. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government “may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance”. It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries’ and agencies’ operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision makers.

Additionally, the Court outlined the role of the courts in reviewing Crown decisions where aboriginal people allege a failure to consult at para. 62:

62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action “viewed as a whole, accommodates the

collective aboriginal right in question”: *Gladstone*, supra, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, supra, at para. 110, “in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice . . . “. The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

The Court concluded that only on questions of law was the standard of review correctness.

Finally on the facts of the case the Court had no difficulty concluding that the Province had failed to consult with the Haida on the transfer or replacement of T.F.L. 39 because the failure was admitted. However, the Court left open the question of whether, and to what extent, the Province was obliged to seek to accommodate the claimed Haida interest. The Court said at para 77:

77 The last issue is whether the Crown’s duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims.

#### **Duty of Weyerhaeuser**

The Court rejected the concept that Weyerhaeuser could owe a duty to the Haida to consult either

constitutionally or as a necessary part of a remedial order. The Court said:

52 The Court of Appeal found that Weyerhaeuser, the forestry contractor holding T.F.L. 39, owed the Haida people a duty to consult and accommodate. With respect, I cannot agree.

53 It is suggested (per Lambert J.A) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

The Court rejected all theories of Lambert, J.A. in the B.C. Court of Appeal for the foundation of an independent third party obligation to consult. The Court also rejected the proposition that the order

against the Province needed to include Weyerhaeuser for remedial purposes:

55 Finally, it is suggested (per Finch C.J.B.C.) that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result. The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court's determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate (para. 2.38(d). Finally, the government can control by legislation, as it did when it introduced the Forestry Revitalization Act, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees' harvesting rights, in part to make land available for Aboriginal peoples. The government's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations. This, with respect, renders questionable the statement by Finch C.J.B.C. that the government "has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser's consent or co-operation" (2002), 5 B.C.L.R. (4th) 33, at para. 119). Failure to hold Weyerhaeuser to a duty to consult and

accommodate does not make the remedy “hollow or illusory”.

Finally the Court confirmed that private parties may owe the usual common law duties one private party owes to another but that does not elevate the duty to one of constitutional significance:

56 The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown’s duty to consult and accommodate. (emphasis added)

### **Taku**

The Court allowed the appeal. In a unanimous judgment, Chief Justice McLachlin said:

2 I conclude that the Province was required to consult meaningfully with the TRTFN in the decision-making process surrounding Redfern’s project approval application. The TRTFN’s role in the environmental assessment was, however, sufficient to uphold the Province’s honour and meet the requirements of its duty. Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process. In this case, the Province accommodated TRTFN concerns by adapting the environmental assessment process and the requirements made of

Redfern in order to gain project approval. I find, therefore, that the Province met the requirements of its duty toward the TRTFN.

The Court referred to its judgment in *Haida* on the duty to consult:

21 In *Haida v. British Columbia*, 2004 SCC 73, heard concurrently with this case, this Court has confirmed the existence of the Crown’s duty to consult and, where indicated, to accommodate Aboriginal peoples prior to proof of rights or title claims. The Crown’s obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN’s claims through its involvement in the treaty negotiation process, and knew that the decision to reopen the Tulsequah Mine had the potential to adversely affect the substance of the TRTFN’s claims.

The Court then applied its decision in *Haida* on the scope of the duty and concluded:

42 As discussed in *Haida*, the process of consultation may lead to a duty to accommodate Aboriginal concerns by adapting decisions or policies in response. The purpose of s. 35(1) of the *Constitution Act*, 1982, is to facilitate the ultimate reconciliation of prior Aboriginal occupation with de facto Crown sovereignty. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

43 The TRTFN in this case disputes the adequacy of the accommodation ultimately provided by the terms of the Project

Approval Certificate. It argues that the Certificate should not have been issued until its concerns were addressed to its satisfaction, particularly with regard to the establishment of baseline information.

44 With respect, I disagree. Within the terms of the process provided for project approval certification under the Act, TRTFN concerns were adequately accommodated. In addition to the discussion in the minority report, the majority report thoroughly identified the TRTFN's concerns and recommended mitigation strategies, which were adopted into the terms and conditions of certification. These mitigation strategies included further directions to Redfern to develop baseline information, and recommendations regarding future management and closure of the road.

45 Project approval certification is simply one stage in the process by which a development moves forward. In Haida, the Province argued that although no consultation occurred at all at the disputed, "strategic" stage, opportunities existed for Haida input at a future "operational" level. That can be distinguished from the situation in this case, in which the TRTFN was consulted throughout the certification process and its concerns accommodated.

Important to the Court's conclusion was recognition that there was a continuing statutory and regulatory process in place to continue to allow the Taku Tlingits' concerns to be the subject of further consultation and accommodation.

### Implications of the Judgment

While the Court confirmed that the Province owed a duty to consult and seek workable accommodation with the Taku Tlingit and the Haida, the Court circumscribed and limited the decisions of the B.C.

Court of Appeal on the scope of the duty and on the steps necessary to achieve adequate consultation and seeking workable accommodation.

The Court confirmed that the duty to consult does not require an agreement be reached nor does it give aboriginal people a veto - aboriginal people are also required to participate in the consultation in good faith. The Province, in turn, is obliged to be reasonable and so long as it has correctly assessed the strength of the aboriginal claim, the decision of the Province will not be set aside by the court.

The Court's conclusion that the Crown did properly consult in *Taku*, provides an important blueprint for successful discharge of the duty. The Court also indicated that efforts at consultation and accommodation which will be tested not against a standard of perfection but a standard of reasonableness.

Notably, the Court completely rejected any theory that private parties owe a duty to consult with or seek a reasonable accommodation with aboriginals who assert rights. While the Court allowed that the Province might delegate some practical on-the-ground aspects of consultation to third parties, the Court confirmed that the legal duty rested solely with the Province and that the legal obligation cannot be delegated.

The implication of the *Haida* and *Taku* decisions is that all Crown actions in Canada, Provincial or Federal, which have the potential to affect the exercise of a s.35 right may attract the duty to consult and in appropriate cases accommodate, whether the rights claimed are aboriginal rights, aboriginal title, or treaty rights. These decisions, therefore, apply not only in British Columbia, but across Canada.

It will therefore be important for business and industry in Canada to ensure that the Provinces and Canada observe their obligations, since failure of a Province or Canada to fulfil those obligations may

lead to delay or prevention of important land and resource use developments in the country.

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