DUTY TO CONSULT DOES NOT APPLY TO ALL ABORIGINAL CONCERNS

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It is relatively common knowledge that the government has a "duty to consult" aboriginal groups when undertaking actions or making decisions that could adversely affect aboriginal rights, aboriginal title and treaty rights. It is not, however, always easy to determine whether a government action might have an impact on one of the specific (constitutionally protected) aboriginal interests or is of a more general nature that does not attract a duty to consult.

Put another way, "Do all aboriginal concerns about government conduct and decisions have to be considered under the duty to consult?"

The short answer is no.

In the recent 2017 decision of *Blueberry River First Nations v British Columbia (Natural Gas Development)*, 2017 BCSC 540, the Court reviewed a decision of the Minister of Natural Gas Development (the "Minister") who entered into a Long Term Royalty Agreement ("LTRA") with five corporate entities whose joint venture existed for the purpose of supplying natural gas to the Pacific North West LNG facility (the "Decision"). Significant portions of the geographic area that are subject to the royalty rates established under the LTRA, overlapped with the traditional territories of the Blueberry River First Nations ("BRFN").

The BRFN sought a judicial review, arguing that that the Minister's Decision was a strategic, high-level decision that triggered the duty to consult and wanted an order setting it aside. The issue for the BRFN was the concern that the LTRA would incentivize oil and gas development in its traditional territory, and would in turn increase industrial development, further impeding the ability of BRFN members to exercise their Treaty rights.

The Minister submitted that the duty to consult had not been triggered because the LTRA only set royalties rates payable to the Province for oil and gas production and did not in any way approve development activities.

After reviewing the three-part test laid out by the Supreme Court of Canada in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, Justice Skolrood determined that the central issue to be decided in this case was whether the Minister's decision to enter into the LTRA could potentially adversely affect the BRFN's

treaty rights, and thus trigger the duty to consult.

After carefully reviewing relevant case law and distilling key principles, Justice Skolrood underscored that the determination of whether the duty to consult has arisen is fact specific and turns on the particular decision and resulting impacts at issue. Further, in order for the duty to be triggered, more than "mere speculative adverse impacts" are required. He went on to say that without a clear understanding of the actual or potential impacts a decision may have, meaningful consultation or the implementation of appropriate accommodations is not possible.

Applying these principles to the Minister's Decision to enter into the LTRA, Justice Skolrood found that the duty to consult was not triggered. He recognized that while the BRFN had a legitimate concern about the impact of past and ongoing industrial activities on their traditional territories (which were also the subject of a recent civil proceeding which has been heard but no decision has yet been rendered), the duty to consult is limited to addressing the adverse impacts of the specific decision under consideration and said:

"Here, there is no causal relationship between the Decision and any adverse impacts that might arise, in that the LTRA does not authorize any development activity or commit [the corporate joint venture] to engage in any activity (para 73)."

He went on to say that in this case, there are no adverse impacts resulting directly from the Decision that would interfere with the BRFN's ability to exercise their Treaty rights. Furthermore, the establishment of royalty rates under the LTRA does not limit or impede "the Crowns ability to manage the oil and gas resources in a way that respects the BRFN's rights and permits it to fulfill its constitutional obligations (para 76)." Justice Skolrood concluded by saying future impacts as a result of the activities of the joint venture are speculative and cannot be adequately considered in the context of this decision.

None of this is to suggest that the scope of the duty to consult has been narrowed. To the contrary, the law in this regard remains as it has stood since the Supreme Court of Canada's historic 2004 decision in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

Anyone dealing with these issues on a regular basis will recognize that the actions of regulators in Canada varies considerably. Sometimes the duty to consult applies, but is not adequately discharged. Sometimes it does not apply, but a consultation process is imposed anyway. And sometimes the duty to consult applies, but the process goes well beyond what the law actually requires (with resulting adverse impacts on third-party rights). None of these scenarios are helpful in advancing reconciliation, but decisions such as this are useful reminders that the duty to consult applies when, where and as the courts have said it does – nothing more and nothing less.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.