THE GENESIS OF THE DUTY TO CONSULT AND THE SUPREME COURT

The judicial genesis of the legal duty of consultation began with a series of Aboriginal right and title decisions providing the foundational principles of the duty to consult.

**Guerin**

Beginning prior to the repatriation of Canada’s constitution, the Supreme Court in *Guerin* found that the Crown had violated its fiduciary duty to the band by failing to consult with them when they accepted a lesser lease and unilaterally changed the legal position of the band, without their knowledge or consent. Justice Dickson stated “In obtaining, without consultation, a much less valuable lease than the promised, the Crown, breached the fiduciary obligation it owed the band.”

**Sparrow**

Then in 1990, the Supreme Court in *Sparrow* deliberated its first post 1982 Aboriginal rights case to explore the content of s. 35 of the *Constitution Act, 1982* where the court expressly limited Crown power and conduct by affirming a duty to consult with West Coast Salish asserting their inherent and constitutionally protected right to fish through a ‘justification test’ where the duty to consult is one factor to be considered when justifying an infringement on Aboriginal rights.

**Van der Peet**

In 1996 the Supreme Court further developed foundational principles on the duty to consult in their adjudication of the definition of an Aboriginal right in *R v Van der Peet*. Van Der Peet is important for proving CHRs off reserve.

**Nikal**

Next in 1996, another Supreme Court decision constraining crown power and affirming the duty to consult regarding resources to which Aboriginal peoples make claim was made in *Nikal*, where Cory J. wrote: “So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement.”

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3 Section 35(1), *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), c 11.
Gladstone

Similarly, the court in *R v Gladstone*\(^6\) applied and modified the *Sparrow* justification test to the Heiltsuk Aboriginal right to harvest and sell herring spawn on kelp. The court held, "Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation, as well as questions such as whether the government has accommodated the exercise of the Aboriginal right to participate in the fishery..."

Delgamuukw

Then, in 1997 the Supreme Court in *R v Delgamuukw*\(^7\) expanded the scope of the duty to consult with the introduction of a ‘spectrum’ on consultation, holding the greater the impact of the rights, the greater the consultation and in some cases, consent would be required.

The Supreme Court 2004 Trilogy

Eight years later, the Supreme Court released what has become termed as the “trilogy” of cases on the duty to consult in:

1. *Haida Nation v British Columbia (Minister of Forests)*,\(^8\)
2. *Taku River Tlingit v. British Columbia (Project Assessment Director)*,\(^9\)
3. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.\(^10\)

*Haida* and Taku delineated a constitutional duty to consult and accommodate Aboriginal rights holders.\(^11\) These decisions were in the context of “asserted but

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\(^6\) *Gladstone v Canada, (Attorney General)*, [1996] 2 SCR 723, 4 CNLR at 52
\(^7\) *R v Delgamuukw*, [1997] 3 SCR 1010 at para 114
\(^8\) *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.
\(^10\) *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.
unproven" Aboriginal right claims confirming the Crown’s duty when it has knowledge, real or constructive of the potential existence of and Aboriginal right or title and contemplate conduct that may adversely affect it. The broad principles in both cases inform the jurisprudence on the duty to consult Aboriginal right claims and are used in the Treaty rights context as Mikisew has demonstrated.

In *Haida*, at issue was the question of what duty, if any, does the government owe the Haida people and whether they are required to consult with them about decisions to harvest the forests and further, to accommodate their concerns before they have proven their title to land and their Aboriginal rights. In its ruling, the court found that the Haida’s claim to title to the area is strong. The Supreme Court provided several important principles on the duty to consult by holding that a claim of Aboriginal title to land exists even if not yet proven in court:

- “The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof.

- The court held that the foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that 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.\(^{12}\)

- The court held that consultation and accommodation before final claims resolution preserve the Aboriginal interest and is an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands any consultation process. It held, "…pending settlement, the Crown is bound by its honour of tie response to Aboriginal concerns."\(^{13}\)

- The court reiterated the ‘spectrum’ that assesses the strength of the claim and the seriousness of the adverse impact on that claim, in determining what type of consultation is required. The range is notification to deep consultation.\(^{14}\)

In *Taku River*, the Tlingit First Nation opposed the effects of a proposal to reopen the Tulsequah Chief mine by building an industrial highway through the heart of the Tlingit’s' traditional territory. The Taku River First Nation participated in an ‘environmental

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* Betsiamites First Nation v Enbridge Pipelines Inc., 2009 FCA 308 (CanLII), and others.
* Haida supra note 16 at para 35.
* Haida supra note 16 at para 31, 32,35, 43-45.
assessment’ process but disagreed with its report and sought to quash the approval of the project. The Tlingit raised concerns about the possible impacts on the wildlife and other traditional uses, as well as their title claim. The court found that the First Nations role in the environmental assessment was sufficient to uphold the Province’s honour and met the requirements of the duty. By participating in the environmental review process, which included measures to address its concerns, the court held that the Province was not under a duty to reach an agreement with the Tlingit people and their failure to do so did not breach its obligations. The court expected that the process of permitting and development of a land use strategy, the Crown would fulfill its honourable obligations. The court rejected the Province’s “impoverished vision of the honour of the Crown” by arguing before the determination of rights through litigation or conclusion of a treaty, it owes only a common law “duty of fair dealing.” The Taku court affirmed the principle that the honour of the Crown, prior to proof of asserted rights or title, to be given full effect in order to promote the process of reconciliation mandated by s. 35(1) of the Constitution Act, 1982.15

The last in the trilogy was the treaty rights case of Mikisew.16 The duty to consult doctrine was extended to Treaty rights when the Mikisew Cree opposed a winter road that would have a ‘injurious’ effect on the Mikisew traditional lifestyle of hunting by crossing traplines and interrupting migration patterns. The Supreme court held that:

- The “taking up of lands” in Treaty 8 required the Crown to consult with the Mikisew Cree to ensure that there was a honourable process in the taking up of lands.17
- The duty to consult arises in relation to Government action that has a potential impact on Treaty Rights. 18
- What is known in the context of the right is more substantial in the Treaty context rendering the rights ‘test’ less relevant.19

The court found that there was inadequate consultation and sent the matter back to the Crown to deal with the project in light of its decision.

**Rio Tinto**

The Supreme Court then did not revisit the duty to consult until 2010 in the *Rio Tinto* 20 case where issues of various administrative bodies where implementing the duty to consult duty.

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15 Taku River supra note 17.
16 Mikisew supra note 16.
17 Ibid at para 18.
18 Ibid at para 67.
19 Ibid at para 21.
Next the court released the cases of Moses, Little Salmon, Behn v Moulton Contracting, and Ross River, delineating further the contours of the duty to consult.

**TSILHQOT’IN**

In June 2014, the Supreme Court of Canada released a watershed decision in *Tsilhqot’in v British Columbia*, granting, for the first time, a declaration of Aboriginal title. The ruling ends a protracted legal battle that began in 1998 when the Tsilhqot’in Nation objected to the Province of British Columbia issuing third party logging authorizations in their traditional territory. In short, this decision affirmed the territorial nature of Aboriginal title, and rejected the legal test advanced by Canada and the provinces based on small spots or site-specific occupation. The Supreme Court also granted a declaration that British Columbia breached its duty to consult the Tsilhqot’in with regard to its forestry authorizations. This case is important for First Nations where a claim of title area also contains cultural heritage resource sites. It also demonstrates the paradox in the current Canadian common law Aboriginal Rights and Title paradigm where the original inhabitants of this land, the Aboriginal people, must prove prior occupation to the new comers, according to their tests.

In *Tsilhqot’in* Supreme Court concluded that the trial judge was correct in finding that the Tsilhqot’in had established title to 1,750 square kilometers of land, and reaffirmed and clarified the test it had previously established in *Delgamuukw* for proof of

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23 *Behn v Moulton Contracting Ltd* 2013 SCC 26.
26 *Ibid.*, at para 1 to 9. The Tsilhqot’in Nation is comprised of six Indian Act bands, one of which is the Xeni Gwet’in Indian Band. In 1998, in response to proposed logging that had been authorized in the 1980s, Chief Roger William of the Xeni Gwet’in Indian Band brought an action, on behalf of the Tsilhqot’in, against the Province of British Columbia and the Government of Canada. The logging was to occur in the Trapline Territory, a region that the Tsilhqot’in claimed lay within their traditional territory. William sought several declarations, including that: the Tsilhqot’in hold Aboriginal title over 4,380 square kilometers of the region including the Tachelach’ed area and the Trapline Territory (Claim Area); the First Nations in the area hold Aboriginal rights to hunt and trap, to trade in skins and pelts taken from the Claim Area (as a means of securing a moderate livelihood), and to capture and use wild horses; and any forestry activity in the area unjustifiably infringed the existing Aboriginal rights. After a 339 day trial spanning five years in the BC Supreme Court, the trial judge accepted a "territorial theory" of establishing title and found title over 40% of the Claim Area. On appeal, the BC Court of Appeal rejected the lower trial Court’s approach and held that Aboriginal title must be demonstrated on a "site-specific basis" requiring intensive presence at a particular site.
Aboriginal title, underscoring that the criteria of occupation: sufficiency, continuity, and exclusivity were established by the evidence in this case.

Some of the key findings were:

- That Aboriginal title was not limited to village sites but also extends to lands that are used for hunting, fishing, trapping, foraging and other cultural purposes or practices.  
- Aboriginal title may also extend “beyond physically occupied sites, to surrounding lands over which a Nation has effective control.” The Supreme Court endorsed further examples of Aboriginal occupation sufficient to ground title including “warning off trespassers,” “cutting trees,” “fishing in tracts of water” and “perambulation.”
- The court also affirmed the importance of not only of the common law perspective, but also, the Aboriginal perspective on title including Aboriginal laws, practices, customs and traditions relating to indigenous land tenure and use holding the principle of occupation must also reflect the way of life of Aboriginal people.
- The Court reasoned that Aboriginal titleholders have the “right to the benefits associated with the land, to use it, enjoy it and profit from its economic development” such that “the Crown does not retain a beneficial interest in Aboriginal title land.”
- That the Government owes a duty to consult and “not merely rights of first refusal,” and breached their duty in this case.
- That Provincial law of general application will continue to apply to Aboriginal title lands, subject to government meeting a "justification" test.

The Supreme Court warned that if governments do not meet their obligations to justify infringements to Aboriginal title, and do not act consistent with their fiduciary duties, their actions would not be protected.

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28 Tsilhqot’in, supra, note 1.
29 Ibid. The Supreme Court held that the criterion of exclusivity may be established by proof of keeping others out, requiring permission for access to the land, the existence of trespass laws, treaties made with other Aboriginal groups, or even a lack of challenges to occupancy showing the Nation’s intention and capacity to control its lands.
30 Ibid.
31 Ibid. Expanding on its reasons in Delgamuukw, the Supreme Court concluded Aboriginal title confers possession and ownership rights including: the right to decide how the land will be used; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.
32 Ibid.
33 Ibid.
Tsilhqot’in confirms the existing jurisprudence on Aboriginal title and helps to protect cultural heritage resources located in asserted Aboriginal title lands by holding the Crown to its fiduciary duty of consultation and accommodation until title is confirmed. The Supreme Court decision requires the Crown (and industry) to meaningfully engage with Aboriginal title holders when proposing any action in their territories. This engagement can no longer be limited, and instead, through the First Nation’s right of enjoyment and occupancy of title land; their right to possess title land; their right to economic benefits of title land; and the right to pro-actively use and manage title land. Implicit in these rights, are the right to manage cultural heritage resources located on both proven and asserted Title lands and the duty of the Government to consult with the Aboriginal title holder.