The Duty to Consult:

Honouring The Treaties & Aboriginal Title

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Introduction

Aboriginal title to land has been a fascinating enigma, especially within the last sixty years in Canadian politics and law. The purpose of this paper is to explore Aboriginal Title under the context of the Trans Mountain Expansion (TMX) Project. Aboriginal Title, as stated, is a complex and puzzling subject that has entire academic focuses on it in many universities across Canada which go well beyond the scope of this paper. The focus on the TMX Project is the basis for this paper for one main reason: it tested the limits of Aboriginal Title in the Canadian court system; more specifically, the Expansion Project tested the Crown's Duty to Consult with Aboriginal people who have title over lands that the project encroaches upon. Indigenous relations has been a major policy issue since the very beginning, and so this paper explores the Duty to Consult and how it works as a tool in the contentious field of Indigenous relations.

It is important to have a well rounded perspective on what the duty to consult is, and how it came to be. Indigenous people of North America have inhabited the area well before the settlement of Europeans, and so first contact and established British sovereignty are good places to start this exploration of the duty to consult. This relationship evolved throughout the years and eventually brought political debate to the Trans Mountain Expansion Project where the duty to consult was put into effect through the Canadian court system. What led to the development of the decisions the court made falls on different court cases, but the Delgamuukw and Haida case were particularly instrumental.

Section 35 and Delgamuukw

The law regarding the duty to consult relies on an important law that cases discussed here will rely on: Section 35 of the Constitution Act of 1982. This law outlines what the "Rights of the Aboriginal Peoples of Canada" are.[1] The "Aboriginal peoples of Canada" involve three different groups: First Nations, as well as "Inuit and Métis."[2] In section 35.1 of the Constitution Act of 1982, it adds provisions which says that Aboriginal peoples must be consulted with if there are any changes made to section 91 of the 1867 Constitution act, specifically, the federal jurisdiction over Aboriginal peoples and their lands.[3] This brings interesting points in regards to how consultation is managed due to the fact that some Aboriginal people reside in Provinces which are governments that have their own constitutionally recognized jurisdictions when it comes to laws within their borders, and that will be discussed further later. Cases, such as Delgamuukw, rely on section 35 when the jurisprudence is developed over the concept of Aboriginal Title.

According to the Supreme Court decision in the 1997 Delgamuukw case, "Aboriginal title at common law is protected in its full form by s. 35(1)," the courts explain further that in section 35, the treaty agreements made between the Crown and "Aboriginal peoples of Canada [were] hereby recognized and affirmed."[4] The courts mention that section 35 thereby

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[1] *The Constitution Act*, 1982, s. 35.

[2] *The Constitution Act,* 1982, s. 35(2).

[3] *The Constitution Act,* 1982, s. 35.1; *The Constitution Act,* 1867, s. 91.

[4] *Delgamuukw v. British Columbia*, 1997 CanLII 302 para. 133.

"constitutionalized" rights that were already existing through common law.[5] In the same paragraph, the court says that "aboriginal title was a common law right whose existence was recognized well before 1982" and then the courts mention the Calder case as an example of a time when those rights were shown to exist before 1982.[6] The Calder case was significant because it helped facilitate the constitutionalization of Aboriginal rights in the 1982 Constitution Act.[7] This leads to the significance of the Delgamuukw case and its significance to the 2020 Federal Court of Appeal case, Coldwater v. Canada, the case that showed the duty to consult in action regarding the TMX project.

The Delgamuukw case was important for the development of the legal framework for the duty to consult with Aboriginal peoples due to its establishment of what Aboriginal Title consists of, because it was soon realized that the idea of Aboriginal Title was unique and needed its own characterisation. The courts explained how Aboriginal Title is "Sui Generis" because "its characteristics" could not be sourced from "common law rules of real property or to the rules of property found in aboriginal legal systems."[8] However, common law does speak of "occupation [as] proof of possession."[9] The courts recognized that Aboriginal Title was sui generis because "it arises from possession before the assertion of British sovereignty, whereas normal estates,

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[5] *Delgamuukw v. British Columbia* para. 133.

[6] *Delgamuukw v. British Columbia* para. 133.

[7] David Cruickshank, "Calder Case," Outcomes and Significance, The Canadian Encyclopedia, Last modified 2017, https://www.thecanadianencyclopedia.ca/en/article/calder-case.

[8] *Delgamuukw v. British Columbia* para. 112.

[9] *Delgamuukw v. British Columbia* para. 112.

like fee simple, arise afterward."[10] So ultimately, this established that Aboriginal Title was a type of enigma when it came to law, and that this court case would have to lay out the legal framework for Aboriginal Title and, not to mention, the duty to consult.

The scope of this paper is not to review Aboriginal Title, however Aboriginal Title does lay the foundations for the duty to consult and, in the Delgamuukw case, the duty to consult was established to some extent. First, Aboriginal groups would have to prove that they occupied the land in question prior to British sovereignty.[11] However, even if an Aboriginal group had title to land, and therefore Aboriginal rights over that land, that land and the rights therein could be infringed upon.[12] Infringing upon lands in which Aboriginal groups have title was a specific question that the courts answered in this Delgamuukw case; they established that "the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial."[13] They explain that this legislative objective should be "of sufficient importance to the broader community as a whole."[14] This could involve "economic development [...] through agriculture, mining, forestry, and hydroelectric power," which would produce an economic advantage for all Canadians and therefore would be considered *compelling and substantial*.[15] However, the courts established that the land itself could not be rendered unusable through the infringement, and that "aboriginal peoples must not be forgotten in this equation"

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[10] *Delgamuukw v. British Columbia* para. 112.

[11] *Delgamuukw v. British Columbia* para. 145.

[12] *Delgamuukw v. British Columbia* para. 140, 161.

[13] *Delgamuukw v. British Columbia* para. 161.

[14] *Delgamuukw v. British Columbia* para. 161.

[15] *Delgamuukw v. British Columbia* para. 202, 204.

when considering the economic advantage for Canadians.[16] This, the act of infringement, was where the duty to consult would come into play.

This consultation can come in a variety of standards, and regardless of the level of standard, the "consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue."[17] Consultation was established by the establishment of what Aboriginal Title was and how it could be infringed upon. This will be important when considering the TMX project and how consultation allowed for the approval of this specific project.

Haida and the Effectivity Principle

The 2004 Supreme Court case, Haida Nation v. British Columbia, furthered the legal framework for the duty to consult that was in the Delgamuukw case. This case recognized that "government has a legal duty to consult" with Indigenous groups, and that "good faith consultation may in turn lead to an obligation to [the accommodation]" of Indigenous groups who have title to land.[18] This case established that the reason why this duty to consult was important was because "the honour of the Crown is always at stake in its dealings with Aboriginal peoples."[19] The courts mentioned that Indigenous groups in Canada were not a conquered people, and that the treaties between Indigenous people and that "the Crown requires that these rights[, of which were established through the treaties, are] determined, recognized and

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[16] *Delgamuukw v. British Columbia* para. 166, 204.

[17] *Delgamuukw v. British Columbia* para. 168.

[18] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 para 9, 10.

[19] *Haida Nation v. British Columbia (Minister of Forests)* para. 16.

respected."[20] This establishes that a special relationship exists between the Crown and Indigenous groups. This relationship is determined by the way in which this relationship was established: through treaty.

In the Delgamuukw case, the trial judge, McEachern C. J., mentions how Indigenous people became conquered people because they could not meet the strength of the Crown, however it has been suggested that the system in which Indigenous people found themselves in made it difficult to establish a proper relationship with the British.[21] This Haida case continues this conversation by explaining how the treaties were a means of "[reconciling] pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35."[22] This explains the philosophy of the duty to consult: that the honour of the Crown is at stake because it is essentially reconciling this relationship that was founded, not on pure subjugation, but on a relationship between two groups that must work together in good faith.[23] According to a researcher, subjugation was an ultimate outcome whereby reservation systems, economic marginalization, cultural erasure, and abuse were established by the dominant group (i.e. the Crown).[24] Legally, however, the courts recognize the rights of Indigenous peoples, specifically their right for consultation, even going as far to recognize the initial sovereignty that

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[20] *Haida Nation v. British Columbia (Minister of Forests)* para. 25.

[21] John Borrows, "Sovereignty's Alchemy: an Analysis of Delgamuukw," *Osgoode Hall Law Journal,* 37, no. 3 (1999): 11.

[22] *Haida Nation v. British Columbia (Minister of Forests)* para. 20.

[23] *Haida Nation v. British Columbia (Minister of Forests)* para. 10, 20.

[24] Michelle M. Sotereo, "A Concept Model of Historical Trauma: Implications for Public Health Practice and Research," *Journal of Health Disparities Research and Practice* 1, no. 1. (2006): 99.

these groups possessed.[25] This suggests that Indigenous people have legal rights, but may not be equipped to practice and develop their sovereignty.

When the TMX project was established, it brought up an interesting question: when does the duty to consult arise? From the previous discussion consultation appears to arise when infringement occurs.[26] It is interesting how in the Delgamuukw case, consultation was viewed in regards to infringement, and in the Haida case, consultation was viewed as a means of keeping the honour and integrity of the Crown. In keeping with both interpretations, anytime in which there is a legitimate claim to Aboriginal Title, the process of consultation must be engaged, both for infringement and in order to keep with the integrity of the Crown's honour.[27] "The strength of the claim [to Aboriginal Title]" will determine how the government will engage in these consultations.[28] In the Delgamuukw case, it is suggested that "full consent of an aboriginal nation" may be required if the infringement is significant enough, and in other situations the minimum may simply be consultation and may not require much additional accommodations.[29] In this perspective, the courts have allowed for every situation to be contextual with no one specific formula.[30] However, consultation in "good faith" is absolutely necessary, regardless of the situation.[31] The provinces would be the government most likely to trigger a duty to consult,

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[25] *Haida Nation v. British Columbia (Minister of Forests)* para. 20.

[26] *Delgamuukw v. British Columbia* para. 140, 161.

[27] *Haida Nation v. British Columbia (Minister of Forests)* para. 37.

[28] *Haida Nation v. British Columbia (Minister of Forests)* para. 38.

[29] *Delgamuukw v. British Columbia* para. 168.

[30] *Haida Nation v. British Columbia (Minister of Forests)* para. 45.

[31] *Delgamuukw v. British Columbia* para. 168.

and since the development of the federation was established after the spark of the relationship between the Crown and Indigenous groups, the duty to consult takes precedence of the lands in which provinces have jurisdiction over.[32]

Although the courts established this relationship between the Crown and Indigenous groups, there is something to say about the effectiveness that Indigenous groups have over their governments. As previously mentioned, Indigenous people were not conquered people, however, in modern times, *effectivity* is an important consideration. When Quebec wanted to secede from Canada, a question asked in the Supreme Court was whether or not Quebec would be recognized for its unilateral actions made against the union of Canada.[33] The courts examined how constitutionally unrecognized authorizations of secession of Quebec from Canada would be viewed on the international stage.[34] The courts recognized that the collective, political will (i.e. democracy) of the people would help strengthen the legitimate claim that Quebec had in its ability to practice its authority.[35] Indigenous nations tend to experience poor socioeconomic conditions and poor political will tends to be apparent in cultural zones that follow poor socioeconomic conditions.[36] In this perspective, Indigenous nations may not have the societal

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[32] *Haida Nation v. British Columbia (Minister of Forests)* para. 59.

[33] Hugh Mellon, Martin Westmacott, eds., *Political Dispute and Judicial Review: Assessing the Work of the Supreme Court of Canada* (Ontario: Nelson Thomas, 2000), 97.

[34] Mellon, Westmacott, eds., *Political Dispute and Judicial Review*, 97.

[35] Mellon, Westmacott, eds., *Political Dispute and Judicial Review*, 97.

[36] Fiscal Realities Economists, "Reconciliation: Growing Canada's Economy of $27.7 Billion," Prepared For

strength to be able to engage in actions of sovereignty when the outcomes of subjugation (i.e. economic devastation, trauma, etc.) are still present in many of these nations today.

Trans Mountain Expansion Project and the Duty to Consult

The TMX Project, when given the go ahead, was challenged in court for its failure in the duty to consult.[37] In mid 2016 the regulatory body, the National Energy Board (NEB), communicated to the government that the TMX Project was ready to be approved and, based on this, the government issued its approval.[38] In the Federal Court of Appeal case, Tsleil-Waututh Nation v. Canada (Attorney General), the courts found that the structure of processes for the duty to consult are adequate, though they found that "Canada failed in Phase III to engage, dialogue meaningfully and grapple with the real concerns of the Indigenous applicants so as to explore possible accommodations of those concerns.[39] The NEB is charged with pursuing the government's duty to consult with Indigenous people.[40] This, along with another concern regarding faulty reports from NEB's evaluation of environmental outcomes of the project, caused the courts to reject the approval for the project until certain conditions were met.[41]

The National Aboriginal Economic Development Board, (2016): 3; Christian Welzel, Inglehart, Ronald, Klingemann, Hans-Dieter, "The Theory of Human Development: a cross cultural analysis," *European Journal of Political Research* 42, (2003): 348, 354. 370.

[37] *Tsleil-Waututh Nation v. Canada (Attorney General),* 2018 FCA 153 para. 4.

[38] *Tsleil-Waututh Nation v. Canada (Attorney General)* para. 1.

[39] *Tsleil-Waututh Nation v. Canada (Attorney General)* para. 6.

[40] *Tsleil-Waututh Nation v. Canada (Attorney General)* para. 493.

[41] *Tsleil-Waututh Nation v. Canada (Attorney General)* para. 5, 7.

This case showed that the jurisprudence from the Delgamuukw and Haida case (as well as many other cases) allowed for a process that met with the rights of Indigenous people, specifically the duty to consult on land where aboriginal title exists. The discussion of the limit is clear, the consultation process does not give Indigenous groups a veto when their rights are being infringed upon (specifically land based rights).[42] The Federal Court of Appeal recognized that these discussions regarding the duty to consult required good faith and "a process of give and take."[43] When the government recognized their failure to adequately consult, they redid their consultation and the project was approved once again.[44] When this new approval was challenged again, the same Federal Court of Appeal explained that adequate consultation was performed and that the courts would not quash the approval of the TMX Project this time around.[45] In this perspective, the courts sought to ensure that the honour of the Crown was met through its need to consult adequately.

Conclusion

The legal framework that developed the the Duty to Consult is exhaustive, and in both the Tsleil-Waututh Nation v. Canada (Attorney General), and Coldwater First Nation v. Canada (Attorney General), Canadian society was able to see this duty in action that has been developing since the inception of section 35 of the 1982 Constitution Act. The Delgamuukw case recognized that Indigenous groups do indeed have legal title to land, and that infringement of these legal

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[42] *Tsleil-Waututh Nation v. Canada (Attorney General)* para. 489, 494.

[43] *Tsleil-Waututh Nation v. Canada (Attorney General)* para. 494. 496.

[44] *Coldwater First Nation v. Canada (Attorney General),* 2020 FCA 34 para. 3.

[45] *Coldwater First Nation v. Canada (Attorney General)* para. 10, 171, 173.

rights was possible.[46] If that infringement occurred, consultation would be triggered.[47] In the Haida case, this consultation process was clarified. The requirement to consult rested in the fact that the relationship between the Crown and Indigenous peoples threatened the honour of the Crown each time the duty to consult was triggered.[48] This was due to the nature of the relationship; Indigenous groups were not conquered, instead treaties were established.[49] That, in itself, showcases the enigma of the duty to consult. When Indigenous nations become more independent, perhaps through economic development and trauma remedies, will Canada see more legitimate and effective means of these nations establishing further sovereignty? It would appear that the relationship between the Crown and Indigenous people is still developing, and the duty to consult will continue to be used as a tool while that relationship changes as Indigenous nations change and develop.

[46] *Delgamuukw v. British Columbia* para. 161.

[47] *Haida Nation v. British Columbia (Minister of Forests)* para. 37.

[48] *Haida Nation v. British Columbia (Minister of Forests)* para. 16.

[49] *Haida Nation v. British Columbia (Minister of Forests)* para. 25.

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