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EXECUTIVE SUMMARY

The Crown has a duty to consult Aboriginal peoples when it has either real or constructive knowledge of an Aboriginal right and title and is contemplating action that might affect either the right or title. To date, the majority of Canadian Aboriginal case law has focused on applying the duty to consult to statutory decisions that could interfere with domestic Aboriginal or treaty rights. Aboriginal peoples have an opportunity to transform international decision making if Canada determines there is a legal requirement to include indigenous voices when negotiating and ratifying international agreements, especially those pertaining to the environment.

Formal legal consultation with indigenous peoples on a country's international negotiating position for agreements that have the potential to impact indigenous rights will be a significant governance and policy shift. Even though the Federal Court of Appeal in *Hupacasath First Nation v Canada (Minister of Foreign Affairs)* rejected consultation requirements for the ratification of an international investment treaty, the negotiation of environmental agreements has much clearer links to Aboriginal rights. As well, the Canadian government's promise to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also has the potential to influence future court decisions. This proposed legal change is not without challenges. Given that there are more than 600 recognized First Nations bands in Canada and many non-status and urban indigenous populations, as well as Metis and Inuit peoples, a workable solution for legal consultation for legislation and other administrative matters should be a focus of indigenous political organizations as they prepare for the implementation of UNDRIP in Canada.

INTRODUCTION

Indigenous peoples have faced challenges participating in the negotiation and development of international law agreements, which has been demonstrated in Canada in a recent claim, brought by the Hupacasath First Nation (HFN). The HFN was attempting to push the consultation envelope as the First Nation sought to provide indigenous peoples in Canada with the ability to shape international policy on matters that may impact their rights. *Hupacasath First Nation v Canada (Minister of Foreign Affairs)* was the first case in Canada where a court was asked to determine whether there was a constitutional obligation to consult prior to ratification of an international investment treaty.[1] The Federal Court of Appeal determined that there is no duty on the government to consult a particular First Nations community prior to the ratification of an international investment treaty that Canada had negotiated with China, as the potential adverse impacts on Aboriginal rights was deemed speculative. This decision can be seen as a narrow precedent, as it only concerns one international agreement and the potential impacts of this agreement on the rights of a particular First Nations community. *Hupacasath FC* was a difficult test case to expand consultation rights, given the uncertainties of linking impacts from future unknown foreign investments to adverse impacts to the specific Aboriginal and treaty rights of a particular First Nation.

While the impacts of an international investment agreement may be determined speculative by a Canadian court, a stronger precedent-setting case may involve challenging the lack of consultation when Canada negotiates environmental agreements, such as those regarding climate change, where a lack of negotiated stringent targets has the potential to impact the ability to hunt, fish and gather, activities that are clearly protected in the many treaties that blanket Canada. As well, formal consultation with indigenous peoples prior to acceding to biodiversity protocols, which aim to provide a process for access to and benefit sharing of traditional knowledge, would seem to be a prudent government action. Unlike the court's decision in *Hupacasath FC*, a future court may not be able to easily dismiss a claim that consultation was owed prior to the accession to or ratification of agreements such as the Paris Agreement on climate change or the Nagoya Protocol to the Convention on Biological Diversity, as there are clearer causal connections between these international environmental agreements and Aboriginal rights and interests. Governments, such as Canada, that are considering the policy and legal implications of implementing UNDRIP[2] should be informed on the breadth of the declaration's potential impacts for international decision making. UNDRIP implementation would build a stronger case that indigenous participation in the development of international agreements may be required, both in Canada, through its unique constitutional requirements, and internationally.

THE DUTY TO CONSULT AND ACCOMMODATE

The relationship between the Crown (federal and provincial governments of Canada) and Aboriginal[3] peoples has rapidly changed over the past decade, due in part to the decision of the Supreme Court of Canada (SCC) in *Haida Nation*,[4] which applied the constitutional protections set

1 2013 FC 900, [2014] 4 FCR 836, [2013] FCJ No 927 (FC) [*Hupacasath FC*].

2 *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007), online: <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> [*UNDRIP*].

3 This paper uses the term "Aboriginal" when discussing rights in Canada as "aboriginal peoples" is the term specifically defined in section 35(2) of the *Constitution Act, 1982* as including the Indian, Inuit and Metis peoples of Canada.

4 *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 [*Haida Nation*].

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out in section 35 of Canada's Constitution[5] in a procedural duty to consult. The duty to consult is triggered "when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it."[6] In *Haida Nation*, the SCC clarified that the source of "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."[7] Known as a three-part test, the duty is applied when the following are present:

- there is knowledge by the Crown of an established or asserted Aboriginal or treaty right;
- Crown conduct is contemplated; and
- there is the potential for an adverse effect of the proposed Crown conduct on an established or asserted Aboriginal or treaty right.

The majority of Canadian Aboriginal case law has focused on applying the duty to consult to statutory decisions that could interfere with Aboriginal and/or treaty rights. Examples of statutory decisions that have been examined by the courts for adequacy of consultation include the issuance of approvals for mineral, oil and gas extraction or forest management undertakings. There is still debate over whether the duty extends more broadly to law making. Although the SCC has not yet ruled on whether the duty to consult applies to legislation, there is a lower court decision that recognized that the duty can be triggered by the introduction of a bill into Parliament, such as introduction of an omnibus bill that changed federal environmental assessment laws.[8] The SCC's decision in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council* did provide some guidance as to whether the duty to consult extends beyond individual resource extraction projects that impact Aboriginal territory. According to the SCC, "government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to 'strategic, higher level decisions' that may have an impact on Aboriginal claims and rights."[9]

The decision in *Rio Tinto* leads to the question: are international agreements, such as the Paris Agreement, "strategic high-level decisions" that impact Aboriginal rights? Canada has acknowledged in its duty to consult guidelines that the duty may be triggered by international agreements.[10] As well, there are provisions in numerous modern treaties that require consultation before Canada consents to be bound by a new international treaty that would give rise to new international legal obligations that may adversely affect a right of a First Nation.[11]

HUPACASATH FIRST NATION v CANADA

Similar to the transformative role Canada's Aboriginal peoples have carved out to shape resource development on traditional territories, there is an opportunity to influence international decision making if it is determined that there is a legal requirement to include indigenous voices when negotiating and ratifying international environmental agreements. Unfortunately, as mentioned above, the first case that sought to have these procedural rights applied to the international sphere was not in the area of environment.

In their memorandum of fact and law, the HFN set out some of their asserted Aboriginal rights, including Aboriginal title. The HFN claimed that their ability to exercise these rights would be impacted because their self-government powers would be constrained if the investment treaty with China was ratified. All the rights enumerated in the HFN's memorandum were tied to land use, conservation and protection of resources:

- the right to harvest, manage, protect and use fish, wildlife, and other resources in HFN's traditional territory in priority to all other users, subject only to conservation;
- the right to have access to exclusive and preferred areas to harvest or to use fish, wildlife and other resources in their traditional territory;
- the right to protect the habitats that sustain fish, wildlife and other resources which the Hupacasath have a right to harvest; and

5 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

6 *Haida Nation*, *supra* note 4 at para 35.

7 *Ibid* at para 16.

8 *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244.

9 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council,* [2010] 2 SCR 650 at para 44 [*Rio Tinto*].

10 "Officials should assess whether provisions in land claim agreements or self-government agreements require that consultation take place in relation to legally binding international instruments. Second, officials must determine whether legislation requires Canada to consult on international instruments. Officials should seek legal advice, which will support the broader departmental or agency assessments and decision-making processes." Canada, Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, (Ottawa: Public Works and Government Services Canada, 2011) at 23, online: Indigenous and Northern Affairs Canada <www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675>.

11 For example, see art 24 of *Tla'amin Final Agreement*, Spring 2014, online: Indigenous and Northern Affairs Canada <www.aadnc-aandc.gc.ca/eng/1397152724601/1397152939293>.

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