Between Consent and Accommodation: What is the Government Duty to Accommodate First Nations Concerns with Resource Development Projects?

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The relationship between Canadian governments and Aboriginal groups continues to shift as a result of political developments and new jurisprudence. The power of Aboriginal groups seems to continually increase. Indeed, it may now be the case that it is not politically possible for natural resource projects in Canada to proceed if there is significant opposition from affected First Nations. This brief examines this issue by considering current Canadian law.

The Prosperity Mine case in British Columbia was quite revealing. The proposed mine went through both the BC and Federal environmental assessment processes. There were significant environmental concerns with the proposal, and First Nations in the area were resolutely opposed. The BC government considered these objections and approved the project. But the Harper Government examined the same concerns and rejected the project, citing among other reasons the strong objections of local First Nations to the proposed use of a cherished lake as a tailings pond. (The proposal has now been altered and it going through review again.)

The core uncertainty is whether governments have the legal authority to proceed with a project if affected First Nations are strongly opposed. The unfortunate answer is that there is no clear answer to this question, and that it depends on the specific situation of the Aboriginal claim, the nature of the proposed infringement, the actions of government to address Aboriginal concerns, and the viewpoint of the reviewing courts.

The UN Declaration's provision for "free, prior and informed consent"

First Nations groups increasingly refer to the provision in United Nations Declaration on the Rights of Indigenous Peoples that says "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (Article 32.1). However, the UN Declaration is not legally binding on signatories. When it finally endorsed the Declaration in November 2010, the Government of Canada took pains to note that it objects to the provision of "free, prior and informed consent when used as a veto." In explaining why it would endorse the Declaration if it had these objections, the government stated: "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework."

What does Canada's legal framework say about government duties in these situations? The best indication of this we have at present are the companion 2004 Supreme Court cases of *Haida* and *Taku*. The *Haida* case was foundational in extending the government's duty to consult to include the need to *accommodate* Aboriginal concerns. But the Supreme Court made it clear at the same time that the obligation to accommodate "does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim." The less celebrated *Taku* case elaborates on this distinction by upholding a case of government approval of a resource project despite the continued opposition from the affected First Nation.

The *Taku* Supreme Court decision case study

In the early 1990s, Redfern Resources sought provincial approval to re-open the Tulsequah Chief underground mine near Atlin in northern British Columbia. Redfern planned to construct a 160 km access road which fell within the traditional territory of the Taku River Tlinglit First Nation (Taku Tlinglit). As part of the environmental review process, stakeholders, including Redfern and the Taku Tlinglit, formed a Project Committee. Three and a half years later, the Project Committee submitted its recommendations to the responsible ministers within the provincial government. The Taku Tlinglit disagreed with these recommendations and submitted their own minority report to the responsible Ministers. After reviewing both reports, the government granted Redfern a Project Approval Certificate (PAC).

Following the issuance of the PAC, the Taku Tlinglit began legal proceedings to overturn the Ministers' decision, stating that the construction of the access road would infringe upon their title and traditional usage rights within the area. Both the lower court and the Court of Appeal agreed with the Taku Tlinglit; the appellate court stated that the PAC had been issued without due consideration for the Crown's fiduciary and constitutional obligations with respect to the Taku Tlinglit. The Court of Appeal then asked the responsible Ministers to reconsider their decision, taking into account their legal obligations to the First Nation.

The province appealed the court's decision to the Supreme Court of Canada (SCC). The SCC released their ruling on November 18, 2004, finding unanimously in favour of the provincial government. In their decision, the SCC determined that the strength of the Taku Tlinglit's claim the disputed area was strong enough to require that the Crown consult and attempt to accommodate their concerns. The strength of the Taku Tlinglit's claim was due in large part to the fact that the land was currently the subject of treaty negotiations between the First Nation and the province. The Court also stated that the construction of the access road would prove highly disruptive to the cultural, social, and economic activities undertaken by the Taku Tlinglit in the area.

Nevertheless, the SCC stated that the province had adequately discharged its duty to consult and accommodate. "Its views were put before the decision makers, and the final project approval contained measures designed to address both its immediate and its long-term concerns. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN."

By fully involving the Taku Tlinglit in the Project Committee review process, the province's consultation process was found to be sufficiently inclusive and thorough. The SCC further concluded that the concerns of the Taku Tlinglit were taken into account by Redfern during their information gathering and analytical activities. The majority report produced by the Project Committee also took note of and recommended measures to remedy the Taku Tlinglit's complaints. The Court was satisfied that there was further room in the more specific permitting process to address concerns about inadequate baseline information and the specific course of the road, and that a joint management authority would be establish to govern the road.

Taku's vague standard for accommodation

The Supreme Court's *Taku* decision is the closest thing we have to an articulated standard of sufficient accommodation. That standard remains extremely vague. It suggests that good faith efforts to address Aboriginal concerns can be demonstrated to be sufficient accommodation. But the specific conditions to meet that test are left deliberately vague, to be determined on a case-by-case basis, not defined outright.

The Supreme Court concludes:

> 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.

This standard is clearly quite a distance from the "free, prior and informed consent" of the UN Declaration. How far the Canadian governmental practice and jurisprudence have moved in that direction will only, it seems, be revealed through further decisions on resource authorizations and judicial review.

Additional Sources:

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