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Supreme Court Decides That Duty to Consult Does Not Apply to Law-Making Process: Mikisew Cree First Nation v Canada

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On October 11, 2018, the Supreme Court of Canada ("SCC") released its decision in *Mikisew Cree First Nation v Canada (Governor General in Council)* ("*Mikisew Cree*").[1] A majority of the Court held that the duty to consult is not triggered by the development of legislation.

The SCC offered four competing opinions about the scope of the duty to consult and whether the honour of the Crown applies to the Legislature. The divided decision indicates that this may be more of a policy than a legal question. The Court recognises that its analysis would not apply where existing Land Claim Agreements require consultation in relation to proposed legislation.[2]

Facts

In 2012 Parliament tabled two bills (Bill C-38 and C-45, collectively, the "Omnibus Bills").[3] The Omnibus Bills proposed sweeping changes to federal environmental laws.[4]

Chief Courtoreille and the Mikisew Cree First Nation (collectively, the "Mikisew Cree") alleged that the Omnibus Bills adversely affected their rights to hunt, trap and fish under Treaty 8.[5] The Mikisew Cree applied to the Federal Court seeking, among other things, a declaration that the federal Ministers have a duty to consult with the Mikisew Cree regarding the development and introduction of the Omnibus Bills.[6]

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1 2018 SCC 40 [*Mikisew Cree*].
2 See the Tlicho Agreement section 23.6.1, Nunavut Agreement section 9.3.1
3 SC 2012, c19; SC 2012, c31.
4 Bill C-38 introduced a new environmental assessment regime and significantly amended the *Fisheries Act* and *Species at Risk Act*. Bill C-45 significantly amended the *Navigable Waters Protection Act*, now named *the Navigation Protection Act*.
5 *Mikisew Cree* at paras 5, 9.
6 *Mikisew Cree First Nation v Canada (Minister of Aboriginal Affairs and Northern Development)*, 2014 FC 1244 at para 6.

Lower Court Decisions

The Federal Court found that the law-making process triggers the duty to consult and that the Omnibus Bills adversely affected the Mikisew Cree's established Treaty rights.[7] The Federal Court issued a declaration that the Mikisew Cree were entitled to consultation.[8]

The Federal Court of Appeal disagreed, and held that the *Federal Courts Act*[9] barred the Federal Court from judicially reviewing legislative action.[10] The Federal Court of Appeal also found that requiring consultation during the law-making process would "be impractical" and would interfere with "Parliament's law making capacity."[11]

The Mikisew Cree appealed to the SCC and argued that the:

1 Federal Court has jurisdiction to review the law-making process, and

2 development and introduction of the Omnibus Bills triggered the duty to consult.

See our earlier article on the Mikisew Cree's application here.

The Mikisew Cree's application raised important questions for the SCC. Does the honour of the Crown apply to the Legislature? Do governments trigger the duty to consult when they develop policy? And what remedies can or should Courts grant if governments develop legislation that could impact Indigenous rights?

The Supreme Court's Decision

The SCC

1 unanimously found that the *Federal Courts Act* does not permit judicial review of parliamentary activities, including the development of legislation,[12] and dismissed the Mikisew Cree's application,[13] and

2 split on the issue of whether the duty to consult is triggered where the Crown develops, passes or enacts legislation that may adversely affect Indigenous rights.[14]

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7 *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244.
8 *Mikisew Cree* at para 10.
9 *Federal Courts Act*, RSC 1985, c F-7 ss 18, 18.1 [*FCA*].
10 *Canada (Governor General in Council v Mikisew Cree First Nation*, 2016 FCA 311.
11 *Mikisew Cree* at para 11.
12 *Mikisew Cree* at para 18.
13 *Mikisew Cree* at paras 15-18, 54, 101, 148.
14 *Mikisew Cree* at paras 48, 89-90, 145, 155.

The Duty to Consult

The SCC's decision on the duty to consult is split across four sets of reasons.

Seven out of nine Justices (a majority) found that the duty to consult is <u>not</u> triggered by the development of legislation:

- Justice Karakatsanis (Chief Justice Wagner and Justice Gascon concurring)[15]
- Justice Brown,[16] and
- Justice Rowe (Justices Moldaver and Côté concurring), concurring with the reasons of Justice Brown.[17]

Two Justices (a minority) disagreed, and concluded that the duty to consult is triggered by the development of legislation. The dissenting opinion was delivered by Justices Abella and Martin.[18]

The SCC disagreed on several points:

1 **Does "Crown conduct" include the development, introduction, consideration and enactment of legislation?**

The duty to consult is triggered by "Crown conduct." Justice Karakatsanis held that the law-making process does not constitute Crown conduct.[19] Crown conduct includes "executive conduct and conduct taken on behalf of the executive,"[20] but excludes legislative conduct, such as the development, passage and enactment of legislation.[21] However, Justice Karakatsanis clarified that the process of adopting subordinate legislation (regulations and rules) constitutes executive conduct, and is therefore subject to the duty to consult.[22]

Justices Brown and Rowe agreed that Crown conduct excludes the legislative or parliamentary role of the Canadian state.[23]

Justice Abella found that "because the honour of the Crown infuses the entirety of the government's relationship with Indigenous peoples, the duty to consult must apply to all exercises of [government] authority"[24] with the potential to adversely affect s. 35 rights, including legislative action.[25]

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15 *Mikisew Cree* at paras 1-54.
16 *Mikisew Cree* at paras 100-147.
17 *Mikisew Cree* at paras 148-172.
18 *Mikisew Cree* at paras 54-99.
19 *Mikisew Cree* at para 2.
20 *Mikisew Cree* at para 27.
21 *Mikisew Cree* at para 31-32.
22 *Mikisew Cree* at para 51.
23 *Mikisew Cree* at para 128 and 148.
24 *Mikisew Cree* at para 63.
25 *Mikisew Cree* at para 55.

2 Does applying the duty to consult to the law-making process conflict with democratic principles?

The SCC considered three democratic principles:

a) **Separation of Powers –** The separation of powers "recognizes that each branch of government 'will be unable to fulfill its role if it is unduly interfered with by the others.'"[26]

b) **Parliamentary Sovereignty –** Parliamentary sovereignty allows Parliament to make or unmake laws within its constitutional authority.[27]

c) **Parliamentary Privilege –** Parliamentary privilege allows legislatures to determine their own procedure to enact legislation.[28]

The majority of the SCC (Justices Karakatsanis', Justice Brown's, and Justice Rowe's reasons) agreed that recognizing a duty to consult during the law-making process would offend these democratic principles because such recognition may:

- "require courts to improperly trespass onto the legislature's domain" and supervise the law making process[29]
- "constrain [Parliament] in pursuing its mandate and therefore undermine its ability to act as the voice of the electorate,"[30] and
- Interfere with Parliament's ability to decide its own procedure.[31]

Justice Rowe provided that "Section 35 rights are not absolute. Like other provisions of the *Constitution Act, 1982* it is both supported and confined by broader constitutional principles."[32]

Justice Abella disagreed and held that democratic principles "cannot displace the honour of the Crown… the right of Aboriginal groups to be consulted on decisions that may adversely affect their interests is not merely political, but a legal right with constitutional force."[33] Justice Abella concluded that the Court must "reconcile, not choose between, protecting the legislative process from judicial interference and protecting Aboriginal rights from the legislative process."[34] In so doing, Justice Abella found that Aboriginal rights impose boundaries on Crown actions.[35]

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26 *Mikisew Cree* at para 35.
27 *Mikisew Cree* at para 36.
28 Subject to the requirements contained in Part IV *Constitution Act, 1867*; *Mikisew Cree* at para 123.
29 *Mikisew Cree* at para 35.
30 *Mikisew Cree* at para 36.
31 *Mikisew Cree* at paras 38, 124, 148.
32 *Mikisew Cree* at para 153.
33 *Mikisew Cree* at para 84.
34 *Mikisew Cree* at para 84.
35 *Mikisew Cree* at paras 86, 88, 91.

3 Would applying the duty to consult to the law-making process be impractical?

Justices Karakatsanis and Rowe discussed the impracticalities of imposing a duty to consult during the law-making process. Justice Rowe stated that the preparation of legislation is a "highly complex process involving multiple actors across multiple governments." Justice Rowe considered that "imposing a duty to consult at this stage could effectively grind the day-to-day internal operation of government to a halt."[36]

Justice Karakatsanis stated that determining the executive steps of the legislative process to which the duty to consult applies would be "an enormously difficult task."[37] She also considered that since changes made to proposed legislation during consultation could be undone by Parliament, meaningful accommodation of Indigenous concerns during legislative development may be limited.[38]

4 What does the Honour of the Crown require of the Legislature?

Justice Karakatsanis concluded that the honour of the Crown applies whether the Crown is acting in its legislative or executive capacity.[39] However, what the honour of the Crown requires will depend on the circumstances in which it is engaged.[40] In some circumstances, the honour of the Crown requires a duty to consult.[41]

Justice Karakatsanis stated that "simply because the duty to consult…is inapplicable in the legislative sphere, does not mean the [Crown] is absolved of its obligation to conduct itself honourably."[42]

Justice Abella agreed with Justice Karakatsanis that the honour of the Crown attaches to both the executive and legislative branches of government.[43]

By contrast, Justice Brown and Justice Rowe concluded that the Crown is a separate entity from the Legislature;[44] therefore, the honour of the Crown does not bind Parliament.[45]

5 What remedies are available to Indigenous peoples where governments develop laws that could adversely affect their rights?

The Mikisew Cree argued that if the development of legislation cannot be challenged on the basis of the duty to consult, Indigenous rights "will be subject to inconsistent protection."[46]

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36 *Mikisew Cree* at para 164.
37 *Mikisew Cree* at para 40.
38 *Mikisew Cree* at para 40.
39 *Mikisew Cree* at para 23.
40 *Mikisew Cree* at para 24.
41 *Mikisew Cree* at para 25.
42 *Mikisew Cree* at para 52.
43 *Mikisew Cree* at para 54.
44 *Mikisew Cree* at paras 102, 129-32, 148, 161.
45 *Mikisew Cree* at para 135.
46 *Mikisew Cree* at para 43.

Justice Karakatsanis affirmed that where *enacted* legislation infringes s. 35 rights, Indigenous peoples can challenge the constitutional validity of the legislation through a *Sparrow* claim.[47] In determining whether legislation that infringes a s. 35 right is justified under the *Sparrow* framework, the Court may consider whether the Indigenous group in question was consulted.[48]

However, Justice Karakatsanis accepted that "if the effects of the legislation do not rise to the level of infringement, or if the rights are merely asserted (and not established), an Aboriginal group will not be able to successfully challenge the constitutional validity of the legislation through a *Sparrow* claim."[49] In such situations, since the duty to consult does not provide an avenue to challenge the development of legislation, Indigenous groups would be left without a remedy.

Where the *Sparrow* doctrine is inapplicable, Justice Karakatsanis noted that "other doctrines may be developed to ensure the consistent protection of s. 35 rights and to give full effect to the honour of the Crown through review of enacted legislation."[50] For example, "other doctrines" could address situations where governments "legislate in a way that effectively removes future Crown conduct which would otherwise trigger the duty to consult."[51]

Justice Brown disagreed that validly enacted and constitutionally compliant legislation could be declared inconsistent with the honour of the Crown, and cautioned that Justice Karakatsanis's approach could "throw this area of the law into significant uncertainty."[52] Justice Rowe added the *Sparrow* infringement analysis strongly incentivized governments to consult in developing legislation.[53]

Justice Abella stated that the duty to consult provides "remedies on a reduced threshold [compared to the *Sparrow* framework], based on the potential for adverse effects on a claimed or asserted right."[54] If the duty to consult does not apply to legislative action, s. 35 rights-holders are left "vulnerable to the same government objectives carried out through legislative, rather than executive, action."[55] Justice Abella asserted that Aboriginal rights required the strong protections provided through the duty to consult as opposed to a "vague and unenforceable right to 'honourable dealing.'"[56]

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47 *Mikisew Cree* at para 43; The *Sparrow* framework provides that the Crown cannot infringe established Aboriginal rights or treaty rights unless it is "justified." According to the *Sparrow* framework, the Crown is "justified" in infringing established Aboriginal or treaty rights where (a) the Crown has a compelling and substantial legislative objective and (b) the public benefit achieved through the infringement is proportionate to any adverse effect on Aboriginal rights. A key consideration in the proportionality analysis is whether the Indigenous group was consulted during the development of the impugned legislation (see *Mikisew Cree* at para 77).

48 *Mikisew Cree* at para 48.

49 *Mikisew Cree* at para 43.

50 *Mikisew Cree* at para 45.

51 *Mikisew Cree* at para 46.

52 *Mikisew Cree* at para 104.

53 *Mikisew Cree* at para 155.

54 *Mikisew Cree* at para 79.

55 *Mikisew Cree* at para 79.

56 *Mikisew Cree* at para 84.

Conclusions

Mikisew Cree offers little certainty to parties invested in the consultation process. Instead of offering a path toward reconciliation, *Mikisew Cree* appears to invite more litigation. For now, *Mikisew Cree* provides the following:

- The duty to consult does not apply to the law-making process (although it does apply to the process of adopting subordinate legislation).
- The honour of the Crown may give rise to new doctrines that address impacts to Indigenous rights where the duty to consult and *Sparrow* frameworks do not apply.
- Whether or not a duty to consult exists, it is good policy for governments to consult affected Indigenous groups during the law-making process.[57]

In practice, consultation on policy options in preparation of legislation, and consultation through House and Senate Committees during law making is often undertaken. While not legally required, we can expect to see a greater effort to consult with Indigenous people affected by proposed legislation as a result of this decision.

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[57] *Mikisew Cree* at paras 48, 54, 145, 155, 166