In A Split Decision, Supreme Court Rejects A Duty To Consult When The Government Makes New Laws

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In its landmark 2004 decision, *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court recognized that when the Crown contemplates conduct that may adversely affect Aboriginal or treaty rights protected by s. 35 of the*Constitution Act, 1982*, it has a duty to consult with Indigenous people whose rights may be affected. But in subsequent decisions, the Court explicitly left open the question of whether "Crown conduct" subject to the duty to consult includes the legislative process. In *Mikisew Cree First Nation v. Canada (Governor General in Council)*, the Supreme Court answered that question deciding 7-2 that the government's duty to consult with Indigenous people **does not apply to the law-making process.**

Two omnibus bill introduced by the federal government in 2012 effected significant changes to Canada's environmental protection regime. The Mikisew Cree First Nation brought an application for judicial review in Federal Court. They argued that the federal government had a duty to consult with them with respect to the introduction and development of these bills because the legislation had the potential to adversely affect their treaty rights to hunt, trap and fish.

In dismissing their appeal, the Supreme Court unanimously held that the Federal Court does not have jurisdiction to judicially review the legislative process, so the application was not properly before the courts. Nevertheless, given its importance, the Court went on in four separate concurring reasons to determine the substantive issue – whether the duty to consult applies when ministers develop and introduce legislation that could adversely affect s. 35 rights. Justice Karakatsanis, writing for herself, Chief Justice Wagner and Justice Gascon, held that the law-making process does not constitute "Crown conduct" that triggers a duty to consult. The constitutional principles of separation of powers and parliamentary sovereignty dictate that courts should forebear from intervening in the law-making process, and therefore it would be inappropriate to apply the duty to consult doctrine to legislative action. Addressing the First Nation's concerns, however, that failure to recognize a duty to consult in this context would leave a gap in remedies, Justice Karakatsanis noted that "[o]ther doctrines may be developed" to give full effect to the honour of the Crown, but that "the resolution of such questions must be left to another day".

Justice Abella, writing on behalf of herself and Justice Martin, disagreed. In her view, the honour of the Crown infuses all aspects of the government's relationship with Indigenous people, and there is no principled basis to exclude the enactment of legislation from the duty to consult. Nevertheless, to respect the constitutional balance between the judiciary and the legislature and not unduly interfere with the legislative process, she would only permit applicants to challenge existing legislation after it has been enacted without proper consultation. The typical remedy for legislation enacted in breach of the duty to consult would be a declaration of the breach, not invalidation of the legislation.

Justice Brown agreed with Justice Karakatsanis that the duty to consult does not apply to the legislative process. But he wrote separately because in his view, Justice Karakatsanis was not categorical enough in her reasons for rejecting the duty. He was further concerned that her suggestion – without deciding – that legislation that does not infringe s. 35 rights could nonetheless be found to be inconsistent with the honour of the Crown would "throw this area of the law into significant uncertainty". He lamented that a question of constitutionality going to the limits of judicial power warranted a clear answer from the majority of the Court – a goal that does not seem to have been achieved with the Court releasing four separate concurring reasons.

Justice Rowe, on behalf of himself and Justices Moldaver and Cote, agreed with Justice Brown, but raised a few additional points regarding other avenues to vindicate s. 35 rights and the adverse effects of recognizing a duty to consult during the legislative process.

By

Laura M. Wagner

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Centennial Place, East Tower
520 3rd Avenue S.W.
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F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749