

Supreme Court of Canada finds no duty to consult with First Nations in the development of new legislation

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The Supreme Court of Canada (SCC) recently issued its decision (11 October 2018) in *Mikisew Cree First Nation v. Canada*, finding that the duty to consult does not apply to the development of legislation by ministers.

The key issue in this case was whether the Crown had a duty to consult with First Nations during the development of legislation that may adversely affect Aboriginal rights. As the case progressed an additional question arose - whether the *Federal Courts Act* allows a federal court to apply the parliamentary process to judicial review.

The Appeal raised two issues, whether the Federal Court of Appeal had jurisdiction to hear the claim, and, if so, was the duty to consult triggered?

In its decision, the SCC unanimously found that the Federal Court lacked the jurisdiction to hear the claim. They agreed that the *Federal Courts Act* does not allow for the review of parliamentary activities and so judicial review of the legislative process by the Federal Court is precluded. While the findings of the Court in regard to jurisdiction are important from an administrative law perspective, this discussion will focus on the duty to consult issue where there was no unanimity among the Court.

Interpreting the Decision

The initial question is what to make of the Justice's 3-2-1-3 split opinion on duty to consult. The predominant decision on duty to consult appears to be Justice Brown's. His decision attracts the support of a number of other Justices (Rowe, Moldaver, and Côté) and specifically rejects significant elements of Justice Karakatsanis' reasoning.

The rationale of Justice Karakatsanis and Justice Abella, though in agreement with respect to the administrative law question, did not align on the question of whether a duty to consult arose. While Justice Brown's comments on the duty to consult are technically obiter, he nevertheless gained the support of a majority of the Court and it is our view that his reasons signify an important affirmation of the need for certainty on the duty to consult.

Seeking Certainty on the Duty to Consult

In regard to the whether law-making triggers the duty to consult, Justice Brown's reasons generally mirror those of Justice Karakatsanis, both accepting that parliamentary privilege and the separation of powers prevent the judicial obligation of the duty to consult on the law-making process. However, more importantly for questions regarding the duty to consult in the future, Justice Brown emphasizes that the Court must strive for certainty in this area and that the uncertainty in Justice Karakatsanis' reasons benefits no one, including the Indigenous peoples seeking to rely on the duty to consult.

With certainty as his goal, Brown J. embarks on a detailed analysis. In particular, he finds that the duty to consult, which arises from the honour of the Crown, does not apply to the Crown in its legislative capacity. This strong statement effectively seeks to shut the door that the reasons of Justice Karakatsanis and Justice Abella appear to have cracked open for challenges to properly enacted (non-rights infringing but rights-affecting) legislation in a manner inconsistent with the honour of the Crown.

If that was not enough, Justice Brown clearly sets out the applicable principle that: *"judicial review of the legislative process, including post-facto review of the process of legislative enactment, for adherence to s. 35 and for consistency with the honour of the Crown, is unconstitutional."*

Justice Brown's emphasis that the Supreme Court must strive to avoid uncertainty and his willingness to engage in the analysis necessary to provide certainty is especially welcome in the realm of the duty to consult. As has been seen in the aftermath of the Federal Court of Appeal's decision in *Tsleil-Waututh v Canada*, the scope and application of the duty to consult remains uncertain. The efforts of Justice Brown and the Justices who concurred with him, is a welcome statement.

Rejection of Justice Abella's Reasoning

Aside from Justice Brown's call for certainty, the other important takeaway from this case is from Justice Abella's reasons on the duty to consult. Justice Abella takes a very expansive view on the duty to consult and the Court's rejection of her approach may serve to put some outer limits on this duty. She finds that the duty to consult *"attaches to all exercises of Crown power, including legislative action"* in her reading of the Court's previous jurisprudence.

The majority's explicit rejection of Justice Abella's reasons on this point and implicit rejection of the notion that the Court's prior case decisions mandates a continued expansion of the application of the honour of the Crown may prove to be the most important aspect of this decision going forward.

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