

# Assessing the Duty to Consult

by Malcolm Lavoie

The duty to consult Indigenous peoples is a constitutional obligation that applies in relation to a wide range of government decisions that could affect constitutionally protected Aboriginal and treaty rights. It has come to play an important role in determining whether and under what conditions major resource development projects can be built in Canada. This study seeks to assess how the duty to consult has functioned in this role.

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## Part One—Reconciliation and Uncertainty

Part One begins by setting out the origins and purpose of the duty to consult, which seeks to reconcile the Crown governance authority with the rights of pre-existing Indigenous nations. While this is a vitally important purpose, the duty to consult has also given rise to significant legal uncertainty. There are several reasons for this, including the fact that the duty to consult is structured as an open-ended procedural standard, with specific requirements determined on a case-by-case basis.

The uncertainty associated with the duty to consult is exacerbated in cases involving major projects like pipelines. Where a project affects a large number of Indigenous communities, the likelihood that all parties will reach agreement is low. Moreover, in these cases the practical challenges associated with consultation are elevated, making meaningful two-way dialogue more difficult to achieve. Legal uncertainty and delay can in principle raise the cost of capital for private-sector

project proponents to such a degree that a project will no longer be viable. In these cases, the threat of litigation over the duty to consult can give rise to a de facto veto power. A veto power of ill-defined scope, and with the potential to apply to projects that extend beyond a group's traditional territory, fails to affirm the Crown's authority to make policy decisions in the public interest. This is particularly troubling in the context of projects that are supported by some affected Indigenous communities but opposed by others. In these cases, the exercise of an effective veto systematically privileges the interests and views of communities opposed to development over those that support it.

## Part Two—the Way Forward

Part Two seeks to help policy-makers find a way forward. The first section of Part Two provides legal context for the duty to consult. The duty to consult is only one mechanism by which the rights of Indigenous peoples are reconciled with Crown sovereignty. A range of substantive rights in

resources, including Aboriginal rights, Aboriginal title, treaty rights, and property interests in reserve lands can serve to delineate the authority of Indigenous communities and insulate Indigenous decision-making from unjustified outside interference. Substantive rights can provide greater legal certainty than a process-based standard like the duty to consult. Accordingly, one important way to address the legal uncertainty associated with the duty to consult is to encourage greater reliance on clearly defined substantive rights, including property rights, as an alternative means of reconciling Indigenous interests with the Crown's authority.

The second section of Part Two proposes a range of possible policy solutions. Several of the proposed solutions are based on defining substantive Indigenous rights with greater precision. First, modern treaties between Indigenous groups and the Crown can help resolve the uncertainty associated with outstanding land claims. In principle, these agreements can provide for clearly defined substantive rights while reducing the scope of the duty to consult. Second, governments and courts can find ways to facilitate litigation over substantive rights. Unlike litigation over the duty to consult, litigation over substantive Aboriginal rights and title generally results in a judicial decision that provides guidance going forward as to the applicable substantive rights in relation to resources. Third, the content of substantive rights can be defined with greater precision. One important point that should be clarified relates to the circumstances under which constitutionally protected Aboriginal rights in resources can be subject to expropriation with just compensation.

In addition to finding ways to encourage greater reliance on substantive rights, policy makers can also seek to provide greater clarity on how the duty to consult itself functions. The first way to do this is to pursue litigation strategies that lead the courts to resolve outstanding ambiguities in consultation jurisprudence. A second step policy makers could take would be to adopt government consultation policies or develop consultation protocols in conjunction with Indigenous groups. In principle, these policies and protocols can provide guidance to parties regarding the specific content of consultation obligations, as well as applicable timelines.



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