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Supreme Court creates uncertainty in finding no duty to consult during the law-making process

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The Supreme Court of Canada in *Mikisew Cree First Nation v. Canada (Governor General in Council)* definitively answered, by a 7-2 majority, that the duty to consult does not apply to the development, passage and enactment of legislation — an issue previously left open by the Supreme Court. However, by issuing three separate and distinct sets of reasons for reaching this conclusion, and additional reasons dissenting on this point, the Supreme Court has introduced considerable uncertainty into the relationship between the law-making process and the honour of the Crown.

Background

Mikisew Cree First Nation (Mikisew) filed an application for judicial review on the basis that Cabinet failed to consult with it regarding the development and introduction of omnibus bills that amended Canada's environmental protection, assessment and regulatory regime.

In an unprecedented decision, the Federal Court found that the Crown owed Mikisew a duty to consult regarding these changes. However, the Federal Court of Appeal allowed the appeal, setting the stage for the SCC to answer a question it had explicitly left open: Does the duty to consult apply to the law-making process?

The Decision

The SCC issued four sets of reasons for its decision. The Supreme Court was unanimous that the federal courts lack statutory jurisdiction to judicially review the legislative process. However, this conclusion would not preclude a provincial superior court from exercising its inherent jurisdiction to hear a similar case regarding the duty to consult. Therefore, the

Supreme Court's findings regarding the duty to consult remained critical to clarify whether a duty was owed.

Seven justices found that there was no duty to consult, but provided different reasons for doing so and offered conflicting views on the relationship between Aboriginal and treaty rights and the law-making process. In contrast, two justices would have found a duty to consult regarding the legislative process.

Disagreement regarding the duty to consult

The SCC delivered three separate sets of reasons finding that the duty to consult does not apply to the law-making process.

Karakatsanis J. (Wagner C.J. and Gascon J. concurring) found that the separation of powers between the judicial and legislative branches and Parliament's sovereignty and privilege to make or unmake any law it chooses dictate that courts should not intervene in the law-making process.

Writing on his own, Brown J. went further, stating that the honour of the Crown does not bind Parliament and finding that Parliamentary sovereignty, Parliamentary privilege and the separation of powers are matters of constitutionality that limit judicial power.

Rowe J. (Moldaver and Côté JJ. concurring) largely agreed with Brown J., adding a number of additional points, including policy concerns about the disruption to legislative work and ongoing judicial supervision of the legislative process.

Dissenting on this issue, Abella J. (Martin J. concurring) found that the duty to consult applies to all contemplated government conduct with the potential to adversely affect asserted or established Aboriginal and treaty rights — including legislative action.

Disagreements aside, the Supreme Court was unanimous that it would be wise for the Crown to consult Indigenous groups regarding the development of legislation. Among other things, a challenge to enacted legislation on the basis of alleged Aboriginal or treaty rights infringement may require the Crown to demonstrate that it consulted the applicant Indigenous group.

New legal uncertainty arising from the Decision

There are two new issues of legal uncertainty that arise from the Decision:

1. *Does the honour of the Crown impose obligations during the law-making process?* Karakatsanis J. left the issue open, finding that the honour of the Crown and other doctrines may ultimately be recognized in future cases where Aboriginal or treaty rights may be adversely affected by legislation. Brown and Rowe JJ. both disagreed. Brown J. said that such reasoning "throw[s] this area of the law into significant uncertainty." Rowe J. reasoned that there was no requirement in this case to adapt or extend existing jurisprudence, as Indigenous groups have an adequate remedy to legislative impacts on their rights through the infringement/justification framework in *Sparrow*.
2. *What remedies are available for a breach of the duty to consult?* In much of the SCC's consultation jurisprudence it has accepted that the remedial framework for breaches of

the duty to consult is flexible. Indeed, this is accepted in the reasons of both Karakatsanis and Abella JJ. However, Rowe J. appears to suggest in his reasons that a decision based on inadequate consultation will be quashed, but various remedies are available for a breach of the duty to accommodate.

As a result of the Decision, these issues will continue to be litigated.

Implications for industry

The Decision provides clarity that the law-making process will not trigger the duty to consult. This provides assurance to industry that the legislative amendments it relies on will not be delayed or reversed by the Crown's failure to consult. However, this may ultimately be a pyrrhic victory if the SCC's diverging reasons are relied on by judicial review applicants to pursue novel claims.

Indeed, a divided SCC on issues of Aboriginal and treaty rights creates uncertainty for all parties that rely on the Crown to adequately discharge its constitutional obligations, including resource sector proponents.