

BEYOND *AUDI ALTERUM PARTEM*: THE DUTY TO CONSULT ABORIGINAL PEOPLES IN CANADA AND NEW ZEALAND

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INTRODUCTION

This paper explores the principle of *audi alterum partem* under administrative law and determines its application to the Māori people in New Zealand and the Aboriginal people in Canada. My basic argument is that the New Zealand courts should follow the lead of the Canadian courts in developing a special duty to consult Indigenous peoples that goes beyond the general duties of consultation imposed on decision makers. I will first consider what administrative law provides in terms of consultation rights. This provides a background against which to measure the development of a special duty to consult Aboriginal peoples. I will then consider the development of the duty in Canada before finally considering whether a similar duty could be found to exist under the Treaty of Waitangi in New Zealand.

CONSULTATION IN ADMINISTRATIVE LAW

The legal principles on consultation in New Zealand and Canada are very similar. Both countries derive their principles for consultation from the rule of natural justice in the common law known as *audi alterum partem*.¹ Literally this means “hear the other side” and originally applied only to judicial contexts.² However, with the expansion of the State the courts began to apply the *audi alterum partem* rule to executive bodies as well. The result of this has been the development of the *audi alterum partem* rule into a set of principles for government consultation.³ Essentially if the government or a government body wishes to affect a person’s rights, it must consult with that person first. A good definition of what consultation involves is given by the New Zealand Court of Appeal in the leading New Zealand case on the issue, *Wellington International Airport v Air New Zealand*.⁴ The Court set out the requirements of consultation as:

[T]he statement of a proposal not yet fully decided upon, listening to what other have to say, considering their responses and then deciding what will be done.⁵

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¹ A Le Sueur, J Jowell and H Woolf, *De Smith’s Judicial Review* (6th ed, 2007) 346-354.

² P Joseph, *Constitutional and Administrative Law in New Zealand* (2007) 955.

³ *Ibid.*

⁴ [1993] 1 NZLR 671.

⁵ *Ibid.*, 675.

Essentially, then, a person with a consultation right must be given the opportunity to be heard, listened to and taken seriously. That then raises the question of when exactly might a person have a consultation right?

The first answer to this question is easy; a statute might say that a decision maker has to consult. However, in the absence of a statutory direction, the common law may impose duties of consultation on administrative decision makers depending on the power that is exercised by the decision maker and the nature of the decision at hand.⁶ Three factors have particular influence over whether consultation is required. First, the closer the decision is to a judicial process, the more likely consultation will be required.⁷ Second, the statutory context is crucial in determining whether a decision maker is required to consult.⁸ Finally, the greater the effect of a decision on an individual and especially on individual rights, the more likely it is that consultation will be required.⁹

Several of the factors used to determine whether a person should be consulted make it difficult for Indigenous peoples to assert consultation rights. First, many decisions affecting Indigenous peoples are to do with natural resources. These decisions have high policy content and are at the opposite end of the spectrum to judicial decisions, thus reducing the chance of consultation being required.¹⁰ Moreover, as Aboriginal rights are group rights there can be debate over whether they should attract the same degree of protection as individual rights.¹¹

Accordingly, the development of any special duty to consult may significantly increase the chances for Aboriginal peoples to be consulted on issues affecting them. This would be a very significant development as it would allow Indigenous people the opportunity to influence decisions affecting them and improve decision making on Indigenous issues. Apart from all that, however, simply having the opportunity to have a say is important. Baragwanath J of the New Zealand Court of Appeal has noted that failure to provide such an opportunity leads to ‘feelings of unfairness, dashed hopes and risks of error’.¹² Accordingly, for peoples that were for so long shut out of decisions affecting them the opportunity to be consulted is very significant.

CANADA

Given the limited opportunity administrative law affords for consultation with Indigenous peoples the articulation of a special duty to consult Indigenous peoples by the Supreme Court of Canada is an exciting development in the field of Indigenous rights. There are

⁶ *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, 141; *Baker v Canada* [1999] 2 SCR 817 [23].

⁷ *Baker*, *Ibid*; *Daganayasi*, *Ibid*, 142.

⁸ *Baker*, *Ibid* [24]; *Daganayasi*, *Ibid* 141; See also *CREEDNZ v Governor-General*, [1981] 1 NZLR 172, 187 per Richardson J.

⁹ *Baker*, *Ibid* [25]; *Daganayasi*, *Ibid* 143.

¹⁰ *CREEDNZ*, above n 8, 177-178 per Cooke J.

¹¹ See, for example the disagreement between Glazebrook and Young JJ and Hammond J over whether interests of Māori under the Treaty of Waitangi are rights requiring a high intensity of substantive review in *Thomson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9, [163, 222-223].

¹² *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 [72].

two sources for the duty to consult in Canada. One derives from fiduciary duties stemming from section 35(1) of Canada's *Constitution Act 1982* and was recognised in *R v Sparrow* and *Delgamuukw v British Columbia*.¹³ However, the New Zealand Court of Appeal has recently rejected a submission that Maori may make claims based on fiduciary duties. This means that for the moment at least claims for consultation rights based on this line of authority are unlikely to succeed.¹⁴ For this reason, and because the second source of the duty to consult Indigenous peoples articulated by the Canadian Courts is much wider than that based on fiduciary duties, this paper will not discuss consultation from fiduciary duties any further.¹⁵ It will instead focus on the later judicial development of recognising a duty to consult based on the honour of the Crown articulated in *Haida Nation v British Columbia (Minister of Forests)*¹⁶ and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*¹⁷

In judgments delivered on the same day, in *Haida Nation* and *Taku River* the Supreme Court held that a duty to consult stemmed from section 35(1) of the *Constitution Act 1982* and the honour of the Crown. Section 35(1) provides:

The existing aboriginal and Treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed

The Court in *Taku River* defined the honour of the Crown in the following terms:

The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s.35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of the just settlements of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.¹⁸

The Court in *Haida Nation* went on to derive an obligation to consult from the principle in the following terms:

¹³ [1990] 1 SCR 1075, 1119; [1997] 3 SCR 1010 [168].

¹⁴ *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318, [71].

¹⁵ Under *Sparrow* and *Delgamuukw* consultation rights could only be asserted where there was an infringement of a proven Aboriginal right. As will be seen, *Haida Nation* and *Taku River* allow consultation rights to be asserted when there is a breach of proven or potential aboriginal rights. Accordingly, any consultation rights derived from fiduciary duties may now also be derived on the basis of the duty recognised in *Haida Nation* and *Taku River*. See and compare *Ontario (Minister of Municipal Affairs and Housing v Trans-Canada Pipelines* [2000] 3 CNLR 153 [119] and *Haida*, below n 16, [17, 26-31].

¹⁶ [2004] 3 SCR 511.

¹⁷ [2004] 3 SCR 511; [2004] SCR 550. The Supreme Court has affirmed the duty in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR. 388.

¹⁸ *Taku River*, above n 17, [24]. For other explanations of the concept see *Haida Nation*, above n 16, [17, 19, 25].

Section 35 represents a promise of rights recognition, and “[I]t is always assumed that the Crown intends to fulfil its promises” (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s.35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights. This, in turn implies a duty to consult.¹⁹

In essence the Crown held that if Aboriginal rights were to be recognised according to section 35(1) they first had to be defined, and consultation would be necessary for this process. It followed, the Court held, that the honour of the Crown leads to a duty to consult when the Crown has actual or constructive knowledge of the existence or potential existence of an Aboriginal right and contemplates conduct that might adversely affect it.

It is not possible in this paper to go into too much detail on what situations the duty to consult may arise in but it should be clear that the constructive knowledge test combined with the fact that section 35(1) is part of Canada’s supreme law means that the duty to consult in Canada is potentially much wider than consultation under general principles of administrative law.²⁰ In essence then the courts have been able to greatly expand the ability of Aboriginal peoples to participate in decision making by finding a source for a duty to consult outside of the *audi alterum partem* principle in administrative law. I will now examine whether it is possible for the New Zealand courts to do the same.

NEW ZEALAND

The most likely source for a special duty to consult Aboriginal peoples in New Zealand is the principles of the Treaty of Waitangi. The Treaty is New Zealand’s founding document. Like section 35 of the *Constitution Act 1982*, Article 2 of the Treaty guarantees that the Crown will protect Maori customary rights.²¹ However, unlike the Canadian constitution the orthodox view of the effect of the Treaty is that it has no legal effect unless incorporated into domestic law.²² Moreover, the age of the document and inconsistencies in the Maori and English versions of it make it a very difficult document to interpret.²³ Due to the difficulties in using the text of the Treaty directly, obligations under it have tended to be incorporated into decisions by references to the principles of the Treaty of Waitangi.²⁴ According to the Privy Council the Treaty principles are the ‘underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole’.²⁵

¹⁹ Above n 16, [20].

²⁰ Section 52(1) *Constitution Act 1982*.

²¹ Treaty of Waitangi/Te Tiriti o Waitangi, First Schedule to the *Treaty of Waitangi Act 1975*.

²² *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590.

²³ P McHugh, *The Māori Magna Carta* (1991) 3-9. For perspectives on the debate over the meaning of the Treaty see Joseph, above n 2, 45-60; M Belgrave, M Kawharu and D Williams (eds), *Waitangi: Revisited Perspectives on the Treaty of Waitangi* (2005).

²⁴ McHugh, *Ibid*, 4.

²⁵ *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 516.

Treaty principles can have legal effect in two ways. First, they are expressly incorporated into several wide ranging statutes such as the *Resource Management Act 1991*, the *State Owned Enterprises Act 1987* and the *Conservation Act 1987*.²⁶ Second, they may be relevant to interpreting legislative provisions or statutory discretions.²⁷ Accordingly, if Treaty principles were found to provide a source for a duty to consult it would have a reasonably widespread effect.

There are currently conflicting case authorities on whether consultation is a Treaty principle. For the purposes of this discussion I will call them the Lands line and the Forests line. The Lands line is based on the landmark 1987 decision is *New Zealand Maori Council v Attorney-General*,²⁸ which was the first to really define the Treaty principles. Here, the Court of Appeal rejected a submission that consultation was a Treaty principle. The judges claimed such a principle would be ‘elusive and unworkable’.²⁹ However, Richardson J did accept that other Treaty principles such as good faith and partnership may sometimes require consultation.³⁰ This position has been followed in the Waitangi Tribunal and the lower courts.³¹

However, there is a conflicting line of authority, the Forests line. This derives from the decision of the Court of Appeal in a later case, *New Zealand Māori Council v Attorney-General*.³² Here the Court of Appeal held ‘it is right to say the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues’.³³ Judge Kenderdine picked up on this in the later Planning Tribunal decision of *Gill v Rotorua District Council* and held ‘One of these principles is that of consultation with tangata whenua’.³⁴ This position has been affirmed in the High Court in *Quarantine Waste (NZ) Ltd v Waste Resources Ltd* and *Worldwide Leisure v Symphony Group Ltd*.³⁵

It is relatively easy to see the basic problem here. What does “truly major issues” mean? It is the uncertainty inherent in that concept that has allowed some lower courts to leave the law fairly unsettled in this area. However, if the Court of Appeal were faced with the

²⁶ Sections 8, 9 and 4 respectively.

²⁷ *Huakina Development Trust v Waikato Valley Authority & Bowater* [1987] 2 NZLR 188.

²⁸ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

²⁹ *Ibid*, 665 per Cooke J; 683 per Richardson J.

³⁰ *Ibid*.

³¹ Waitangi Tribunal, *Ngai Tahu Report Vol 2* (1991) 245. *Te Waero v Minister of Conservation* (Unreported, High Court Auckland, M360-SW0, 19 February 2002, Harrison J) [59]; *Hanton v Auckland City Council* [1994] NZRMA 289, 301-302; *Rural Management Ltd v Banks Peninsular District Council* [1994] NZRMA 412, 423-424; *Greensill v Waikato Regional Council* (Unreported, Planning Tribunal, 6 March 1995, W 17/95) 8. For a summary of the jurisprudence see: P Beverley, ‘The Incorporation of the Principles of the Treaty of Waitangi into the Resource Management Act 1991 – Section 8 and the Issue of Consultation’ (1997) 1 *New Zealand Journal of Environmental Law* 125.

³² [1989] 2 NZLR 142 (CA).

³³ *Ibid*, 152 per Cooke P.

³⁴ (1993) 2 NZRMA 604, 616. Judge Kenderdine affirmed that the consultation was a discreet Treaty principle in *Haddon v Auckland Regional Council* NZRMA 49, 61 and *Wellington Rugby Football Union Incorporated v Wellington City Council* (Unreported, Planning Tribunal, 30 September 1993 W 84/93) 22-23.

³⁵ [1994] NZRMA 529, 542; [1995] NZAR 177, 187.

question today what should it do? I would argue that the duty to consult should be accepted as a Treaty principle. This is for three reasons, which are stated below.

First, the main concern in the Lands line has been demonstrated by Canadian experience to be groundless. Far from the duty to consult in Canada being elusive and unworkable it is certainly no less uncertain than the duties of consultation administrative law imposes. These are highly context dependent, varying according to the nature of the decision, the decision maker and the statute. The duty to consult Indigenous peoples as set out in *Haida Nation* and *Taku River* is triggered on the fairly familiar legal standard of actual or constructive knowledge.

Second, the concept of the honour of the Crown so crucial to the Canadian Courts is equally available to New Zealand courts as it derives from English law,³⁶ specifically, the historical English legal principle that the King could do no wrong.³⁷ Indeed, the instructions to make the Treaty of Waitangi expressly state that the treaty making process engaged ‘the faith of the British Crown’.³⁸ Further, in the “Lands” case Richardson J noted that the conduct of Government must conform to the honour of the Crown.³⁹

Finally, the development of a duty to consult would be consistent with the guarantee of *rangatiratanga* in Article 2 of the Treaty. The Waitangi Tribunal has found that the duty to consult is inherent to the principle of *rangatiratanga*.⁴⁰ Although no exact definition of *rangatiratanga* can be given it is widely argued to encompass a right to self-determination.⁴¹ This includes a right for Māori to participate in decision making on the basis of their position as the Indigenous people of New Zealand.⁴² Given that the Canadian experience has shown that a full duty to consult will not cause the problems envisaged by the Lands line, the recognition a full duty to consult as set out in *Haida Nation* and *Taku River* would be more consistent with *rangatiratanga*. This is because recognition of the wider duty to consult would allow more opportunities for Māori to participate in decisions affecting their interests on a unique basis that stems from their right to self-determination as Indigenous peoples rather than on the basis of general principles of administrative law.

CONCLUSION

³⁶ B Slattery, ‘Aboriginal Rights and the Honour of the Crown’ (2005) 29 *Supreme Court Law Review* 433, 449.

³⁷ E Tzimas, ‘*Haida Nation* and *Taku River*: A Commentary on Aboriginal Consultation and Reconciliation’ (2005) 29 *Supreme Court Law Review* 462, 468.

³⁸ ‘Instructions from the Secretary of State for War and Colonies, Lord Normanby, to Captain Hobson, recently appointed HM Consul at New Zealand, concerning his duty as Lieutenant Governor of New Zealand as a part of the Colony of New South Wales, dated 14 August 1839’ CO 209/4, 251-8, reproduced in DW McIntyre and WJ Gardner, *Speeches and Documents on New Zealand History* (1977) 12.

³⁹ Above n 28, 682.

⁴⁰ Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report* (1995) 269.

⁴¹ See M Durie, ‘Tino Rangatiratanga’ M Belgrave, M Kawharu and D Williams (eds), *Waitangi: Revisited Perspectives on the Treaty of Waitangi* (2005), 3-19 for an outline of this debate.

⁴² *Ibid*, 14-15.

An examination of the *audi alterum partem* principle in administrative law reveals that it is difficult for Aboriginal claimants to gain consultation rights under it. In Canada the development of a special duty to consult Aboriginal peoples under section 3(1) of the Constitution Act and the principle of the honour of the Crown has greatly enhanced the ability for Indigenous peoples to assert consultation rights. It is currently unclear in New Zealand whether Treaty principles provide the basis for a similar a duty to consult. However, I would argue that the courts should recognise such a duty on the basis of the honour of the Crown and the principle of *rangatiratanga*. This would ensure that Māori, like the Indigenous peoples of Canada would have a full voice in issues affecting them.