A BROADER PERSPECTIVE OF AUSTRALIA'S 'RIGHT TO NEGOTIATE'

by Kate Madden

INTRODUCTION

Indigenous participation in government proposals affecting Indigenous rights is provided through Australia's 'right to negotiate' procedure. To foster a deeper understanding of negotiation approaches and requirements, it is useful to consider how participation rights are carried out in another context also involving government proposals affecting land-related rights claimed or held by Indigenous people. In this article, Australia's system shall be explained and considered in view of Canada's 'duty to consult'.

AUSTRALIA'S 'RIGHT TO NEGOTIATE'

The Commonwealth's *Native Title Act 1993* ('NTA') provides registered native title claimants or determined native title holders procedural rights through the 'right to negotiate' which applies to certain dealings that affect native title. The right to negotiate applies where a future act,[1] such as the grant of a mining tenement, is proposed to be carried out on an area subject to that native title claim or determination.[2] In some cases, more than one native title claim might overlap the proposed tenement.

Indigenous participation in negotiations is provided through the NTA's s 31(1)(b) requirement that negotiation parties—the state government, any grantee party (for example, a mining company) and any native title party for the relevant area[3]—negotiate in good faith. Such negotiations are with a view to obtaining the agreement of each of the native title parties to the grant of the tenement, with or without conditions.[4]

If parties are unable to reach agreement and six months have passed since the state government gave notice of the future act,[5] any party can apply for an arbitral determination seeking a decision about whether the tenement can be granted. If any party alleges that either or both the state government or grantee party did not negotiate in good faith, the alleging party needs to satisfy the National Native Title Tribunal ('the Tribunal') to that effect, and if good faith has not been fulfilled, the Tribunal cannot make the determination.[6]

If good faith is satisfied, the Tribunal decides whether the future act can be done based on a set of criteria.[7] Although one of the determination types allows grant subject to conditions,[8] a significant parameter is that s 38(2) of the NTA prohibits a condition which would entitle the native title party to any profits, income derived or things produced flowing from the tenement grant.[9] Conversely, if parties are still negotiating with each other, the benefits under an agreement are not limited in this way and can include profits, income, etc.[10]

'Negotiate in good faith' is not defined in the NTA and what the Tribunal finds constitutes 'good faith' varies with the circumstances, dependent on the assessment of the evidence presented. Broadly speaking, the Tribunal looks for a genuine attempt to reach agreement, looking at the quality of conduct in all the circumstances rather than looking at a factor in isolation.[11] There are certain Tribunal decisions which receive regular endorsement[12] and the Njamal indicia,[13] a non-exhaustive list of guiding factors, are usually taken into account as part of the discretionary assessment.

CANADA'S 'DUTY TO CONSULT'

In Canada, Indigenous participation in government proposals affecting land subject to Indigenous rights is addressed through their duty to consult, a common law duty clearly enunciated in the prominent case of *Haida*.[14]

The *Haida* decision set out the scope and requirements of the duty to consult, building upon earlier case law involving the duty to consult and Aboriginal title.[15] The Supreme Court of Canada prescribed that the Crown owes Aboriginal people a legal duty to consult and, where necessary, accommodate[16] in connection with decisions affecting Aboriginal rights and title.[17] That duty is triggered when the Crown has 'knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it'.[18] In *Haida*, the Court noted that this duty does not require agreement to be reached nor is it a veto, though consent may be necessary in some circumstances.[19] The recent *Tsilhqot'in* decision is also informative

about such circumstances[20] and, notably, the Court stated that, whether before or after Aboriginal title is established, breach of the duty can be avoided by obtaining consent.[21]

Key features of Canada's duty, with discussion of the Australian context, are as follows.

THE STATUS OF THE CLAIM

An important factor in *Haida* was that the duty can be invoked even where there is an unproven claim for Aboriginal title (summarised as a proprietary right allowing exclusive use and occupation for a variety of purposes, which can include ownership of resources and not limited to the uses of the land in the past) in certain circumstances.[22] The Court explained that consultation and accommodation before final claims resolution:

> … is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation …[23]

The unproven claim aspect is similar to how a native title party in Australia has the procedural right to negotiate if they have a registered claim, even though a determination about whether native title exists has not yet been made.[24]

SPECTRUM

Canada's duty operates by way of a spectrum approach.[25] The degree of consultation required is dependent on an assessment of the strength of the claim to Aboriginal right or title as well as the strength of the anticipated impact of infringement by way of Crown conduct.[26] At the lower end, it may be that the Crown should give notice and/or disclose information; and at the higher end, it could involve finding a solution, inviting submissions, allowing formal participation in the process or providing written reasons.[27]

The case-by-case assessment can be seen in the following examples:

(a) In *Haida,* the government's decision to transfer a tree farm licence to a timber company, in view of the strength of the case for Aboriginal title and the reasonable probability that it would infringe the Aboriginal right to harvest red cedar, amounted to a breach of the duty to consult, as the consultation needed to be specific to the licence, rather than regarding plans to reduce the effects of harvesting generally.[28]

(b) In *Little Salmon,*[29] an individual applied for a grant of agricultural land (located in an area subject to a modern land agreement inclusive of the right to hunt and fish) and the duty was satisfied as the government's invitation to the Indigenous group to attend a meeting fell at the right place in the spectrum.[30]

(c) In *Tsilhqot'in*,[31] the government's decision to grant a forest licence in circumstances where the Tsilhqot'in Nation held a strong *prima facie* case and the intrusion was significant amounted to a breach of the duty, as no meaningful consultation took place.[32]

The spectrum approach, being so proportionate and tailored in considering the two distinct questions of claim strength and anticipated impact, involves a considerable administrative task.[33] In contrast, Australia's good faith assessment is more focused on the *quality* of the conduct, with no express requirement for assessing the strength of the claim (beyond meeting the native title claim registration test) or the nature of the intended activities.[34] However, the Tribunal's approach can be proportionate through the assessment of all circumstances. In good faith decisions before it, the Tribunal often considers how reasonable behaviour is in the overall context of negotiations, as one of the Njamal indicia is failure to do what a reasonable person would do in the circumstances.[35]

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CONSTITUTION

A unique aspect of Canada's duty is that it is grounded in the 'Honour of the Crown', which has close ties with:

- the *Constitution Act 1982* s 35(1), which reads: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'; and
- the process of reconciliation.[36]

Specifically:

- 'Honour of the Crown' requires the Crown to act honourably when dealing with Aboriginal peoples in order for the pre-existence of Aboriginal societies to be reconciled with Crown sovereignty; and[37]
- the duty plays a supporting role to and is an adjunct to s 35(1) of the *Constitution*, but does not strictly derive from it.[38]

Canada's duty has strong positioning due to its association with s 35(1) of the *Constitution*; s 35 has been interpreted as providing

a constitutional guarantee of Aboriginal and treaty rights and a protection of Aboriginal title not extinguished prior to the *Constitution* (17 April 1982).[39] In contrast, Australia's *Constitution*[40] provides no express recognition or protection of native title rights,[41] thus the negotiation rights in the NTA are susceptible to legislative change.[42]

There have been various recent efforts to address Indigenous rights in the Australian *Constitution*, including: establishment of the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander People;[43] proposals for providing for the recognition of Aboriginal and Torres Strait Islander Peoples;[44] and consideration of various proposals by the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.[45]

Noting the protective effect of the wording in Canada's *Constitution*, it's possible that similar words could have an impact in the Australian context. However, the notion of incorporating Indigenous protection into the Australian *Constitution* is a complicated proposition,[46] dependent on political environment,[47] and any possible wording from Canada's *Constitution* would require very careful examination.[48]

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PARTIES SUBJECT TO THE OBLIGATION

The responsibility for discharging the Canadian duty lies solely with the Crown, though certain procedural aspects can be delegated to a third party, such as a resource company.[49] The third party often has an interest in the fulfilment of the duty to minimise delay.[50] Similar to Australia,[51] good faith on both sides is expected and Indigenous persons must not frustrate the Crown's efforts or take unreasonable positions.[52]

An arguable strength of the Australian system is that the obligation is widespread, extending beyond the government involved, as it requires *all* negotiation parties to negotiate in good faith.[53] The fact that Canada's duty rests solely upon the Crown (embedded by the principles of 'Honour of the Crown' and reconciliation), and isn't required of third parties such as resource companies, is not considered an opportunity as such for Australia. However, Canada's duty raises an interesting issue regarding the government party's level of responsibility.

Sections 31(1)(b) and 36(2) of the NTA do not specify different wording between the state government and grantee party, which suggests a balanced involvement. However, there are practical realities which distinguish them. The state government has the responsibility of issuing the grant of a tenement if the requirements are fulfilled, but the usual practice is for the grantee party to take a more active role through negotiating a bipartite ancillary agreement with any financial benefits being payable by the grantee party and a tripartite deed between the state, grantee party and native title party to be executed.[54] If each relevant party were subject to some standard legislative factors regarding parties' conduct in negotiations,[55] this would likely have an impact on balancing levels of responsibility and providing an incentive for the relevant parties for meaningful participation, ideals which seem consistent with the 'every reasonable effort' wording in the NTA's Preamble.[56]

FAILING TO MEET THE OBLIGATION

Failure to fulfil Canada's duty can involve injunctive relief, damages or an order that consultation or accommodation be carried out,[57] which are compelling incentives for fulfilling the duty. In Australia, where the Tribunal finds a party has not negotiated in good faith, the arbitral application is dismissed, the parties are to resume negotiations and a subsequent arbitral application can be made.[58] The findings cannot carry with them an order that particular conduct be carried out or that damages be awarded. However, the findings can be a guide for parties' conduct in future and factors such as time and financial constraints can be motivating for parties.

CONCLUSION

It is clear that there are varying approaches to furthering Indigenous participation in negotiations. The quality of negotiations in Australia's right to negotiate context is likely to be increasingly scrutinised amid momentum for constitutional change and awareness of international systems and, through such scrutiny, opportunities can be identified and the suitability of local approaches more fully assessed.

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1 NTA ss 226, 227, 233.
2 Ibid ss 25, 26, 29, 30, 31(1)(b), 245.
3 Ibid ss 30, 30A and s 29(2)(c).

4 Ibid s 31(1)(b).

5 Ibid s 29.

6 Ibid s 36(2).

7 Ibid s 39.

8 Ibid s 38(1); for an explanation of conditions, see *FMG Pilbara Pty Ltd & Anor v Yindjibarndi #1* [2014] NNTTA 79, [175]–[179].

9 NTA s 38(2).

10 Ibid s 33(1).

11 For a useful explanation of good faith, see *Muccan Minerals Pty Ltd & Anor v Taylor & Ors on behalf of Njamal* [2014] NNTTA 74, [17]–[24], [48].

12 For a summary of key decisions, see *Adani Mining Pty Ltd/ Jessie Diver & Ors on behalf of the Wangan and Jagalingou People/ Queensland* [2013] NNTTA 30, [22]–[36].

13 See *Western Australia v Taylor* (1996) 134 FLR 211.

14 *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 3 (*'Haida'*); regarding reconciliation, see [20], [32], [45]; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* 2010 SCC 43, [34] (*'Rio Tinto'*); Chris Sanderson QC, Keith Bergner, Michelle Jones, 'The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose and Limits of the Duty' (2012) 49 *Alberta Law Review* 821–53, 828–9.

15 See *R v Sparrow* [1990] 1 SCR 1075 (*'Sparrow'*); and for a recent summary of case law development, see *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44, [10]–[18] (*'Tsilhqot'in'*); see discussion in Thomas Isaac and Anthony Knox, 'Canadian Aboriginal Law: Creating Certainty in Resource Development' (2004) 53 *University of New Brunswick Law Journal* 427–64.

16 See *Haida* [47].

17 Regarding Aboriginal title, see *Tsilhqot'in* [73]–[80], [88], [94].

18 *Haida* [35], [64].

19 *Haida* [40], [48]; *Beckman v Little Salmon/Carmacks First Nation* 2010 SCC 53, [14] (*'Little Salmon'*).

20 See *Tsilhqot'in* [76], [77], [90], [91], [97]. Broadly speaking, where Aboriginal title is held, the Crown cannot proceed with development unless it can show the infringement was justified and the duty to consult fulfilled (see [91]). For more detail on Aboriginal title and 'justification of infringement', see Derek Inman, Stefan Smis and Dorthde Cambou 'We Will Remain Idle No More: The Shortcomings of Canada's "Duty to Consult" Indigenous Peoples'' 5(1) *Goettingen Journal of International Law* 251–285, 2013, 261. For discussion on *Tsilhqot'in* implications, see Richard Bartlett, 'Indigenous Rights and Resource Development in Australia and Canada' (2014) 33 *Australian Resources and Energy Law Journal* 311–24, particularly 318.

21 *Tsilhqot'in* [97].

22 See *Haida* [32]–[34], [37]; re Aboriginal title, see *Tsilhqot'in* [25]–[26], [30], [32], [45], [47], [59], [73]–[80]; Ryan Beaton, 'Aboriginal Title in Recent Supreme Court of Canada Jurisprudence: What remains of Radical Crown Title?' (2014) 33 *National Journal of Constitutional Law* 61–78, 61,64; contrast the meaning of native title see: NTA s 223; *Mabo v Queensland* (No 2) (1992) 175 CLR 1; Bartlett, above n 20, 312, 313, 317, 319, 320.

23 *Haida* [38].

24 See NTA s 30.

25 *Haida*, endorsed in *Tsilhqot'in* [79]; Janna Promislow, 'Irreconcilable? The Duty to Consult and Administrative Decision Makers' (2013) 26 *Canadian Journal of Administrative Law and Practice* 251–71, 254.

26 *Haida* [60]–[63]; Anthony Knox and Thomas Isaac, 'Judicial Deference and the Significance of the Supreme Court of Canada's Decisions in Haida and Taku River' (2006) 64(4) *The Advocate* 487–501, 491; see also *Rio Tinto* [35], [40].

27 *Haida* [43]–[45].

28 *Haida* [78]; [71], [79].

29 *Little Salmon*.

30 *Little Salmon* [205]; Paul McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (2011) 146–57.

31 *Tsilhqot'in*. Apart from the duty to consult, the case is significant being the first time the Supreme Court of Canada made a declaration of Aboriginal title. See [24]–[94]; Bartlett, above n 20; Pudovskis '*Tsilhqot'in Nation v British Columbia*: a "game-changer" for Canada, Implications for Australia' (2014) 11(5) *Native Title News* 118–21.

32 *Tsilhqot'in* [93], [95], [96], [153].

33 For discussion of the implications of the spectrum approach see: Knox, above n 26, 497; David Mullan, 'The Duty to Consult Aboriginal Peoples—The Canadian Example' (2009) 22 *Canadian Journal of Administrative Law and Practice* 107–25, 113; *Haida* [36], [44]–[45].

34 *Michael Dowse Collins & Anor v Nguddaboolgan Native Title Aboriginal Corporation RNTBC* [2015] NNTTA 13, [79]–[80], [95] (*'Nguddaboolgan'*). Note: the right to negotiate is applicable for a 'native title party' and beyond those requirements, there is no need to show the strength or extent of that status: see s NTA ss 29(2)(a)(b) and 30(1).

35 See *Yellow Rock Resources Ltd & Ors v Shay & Ors on behalf of Yugunga-Nya People* [2014] NNTTA 43, [114] (*'Yellow Rock'*); *Nguddaboolgan* [2015] NNTTA 13, [68], [77]–[83], [91]–[92]; *Backreef Oil Pty Ltd and Oil Basins Ltd/John Watson & Ors on behalf of Nyikina and Mangala/Western Australia*, [2012] NNTTA 98, [48]–[52].

36 Above, n 14.

37 *Haida* [16]; *Tsilhqot'in* [118]; Tom Isaac, Tony Knox and Sarah Bird, 'The Crown's Duty to Consult and Accommodate Aboriginal People: The Supreme Court of Canada Decision in *Haida*' (2005) 63 *The Advocate* 671–90, 674–5.

38 See *Little Salmon* [42]–[44]; *Rio Tinto* [34]; McHugh, above n 30, 156.

39 See *Sparrow* 1105, 1108–9; Margaret Stephenson, 'Indigenous Lands and Constitutional Reform in Australia: A Canadian Comparison' (2011) 15(2) *Australian Indigenous Law Review* 87–106, 90, 93; *Tsilhqot'in* [13]; Kent McNeil, 'The vulnerability of Indigenous Land Rights in Australia and Canada' (2004) 42(2) *Osgoode Hall Law Journal* 271–301, 288.

40 *Commonwealth of Australia Constitution Act 1900* (Cth).

41 For a discussion of some legislative restrictions, see Stephenson, above n 39, 98; Bartlett, above n 20, 319.

42 Stephenson, above n 39, 95.

43 See 'Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel' (2012) 7 *Indigenous Law Bulletin* 21–22; Appendix 1 and 2 of Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples *Progress Report* (October 2014).

44 See cl 3 of Aboriginal and Torres Strait Islander Peoples Recognition Bill (2012) and the recommended insertion of s 51A within the Report of the Expert Panel, above n 43.

45 Joint Select Committee, above n 43; for more discussion on constitutional change, see Paul Howarth, 'Ensuring Indigenous Consent' (2013) 125 *Arena Magazine* 14–15, 15; Megan Davis, 'A Decade On: Inching Closer to Greater Recognition and Protection of Australia's Aboriginal and Torres Strait Islander Peoples' (2013) 22(1) *Human Rights Defender* 22–4, 22.

46 *Constitution* s 128.

47 Joint Select Committee Progress Report, above n 43; also see Davis, above n 44, 22–23 and Howarth, above n 45, 15.

48 For a detailed analysis see Stephenson, above n 39, 95.

49 *Haida* [52], [56]; Mullan, above n 33, 114; Isaac, above n 37, 676. Contrast Australia where all parties are required to negotiate in good faith: see NTA s 31(1)(b) but note s 36(2).

50 For a discussion of third parties, and Impact Benefit Agreements involving an Indigenous group and resource company (often encouraged by government), see Isaac, above n 37, 684; Stefan Matiation, 'Impact Benefit Agreements between Mining Companies and Aboriginal Communities in Canada: A Model for Natural

Resource Developments Affecting Indigenous Groups in Latin America?' (2002) 7 *Great Plains Natural Resources Journal* 204–232, 204, 210, 211, 228.

51 The native title party's conduct can be taken into account: *Yellow Rock* [2014] NNTTA 43, [111]–[113].

52 Isaac, above n 37, 685; *Haida* [42].

53 This has been the case since 1998 amendments. See *Native Title Amendment Act 1998* (Cth).

54 See *Xstrata Coal Queensland Pty Ltd & Ors/Mark Albury & Ors (Karingbal #2);Brendan Wyman & Ors (Bidjara People)/Queensland* [2012] NNTTA 93, [93]–[94].

55 It is noted that various Bills proposed that parties' conduct be assessed in terms of standard criteria for the Tribunal to have regard to: see Native Title Amendment (Reform) Bill 2014 (Cth); Native Title Amendment Bill 2012 (Cth); Native Title Amendment (Reform) Bill (No 1) 2012 (Cth); Native Title Amendment (Reform) Bill 2011 (Cth). Some proposed factors were: attending, and actively participating in, meetings, making reasonable offers and counter-offers, and responding to proposals and providing reasons.

56 For a discussion of the Preamble, see: *Walley v Western Australia* [1999] FCA 3, 578; *Western Australia v Thomas* (1996) 133 FLR 124, 143–4, 149.

57 For a discussion of remedies in particular contexts, see *Tsilhqot'in* [79], [89], [90].

58 See Note to NTA s 36(2); *Nguddaboolgan* [2015] NNTTA 13, [100].

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