

EXTERNALIZING THE DUTY: A CAUSE OF ACTION WHERE CROWN FAILURE TO CONSULT FIRST NATIONS RESULTS IN THIRD PARTY LOSS

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ABSTRACT

The decision-making process underlying Crown authorization of natural resource industry activity may trigger an obligation on the part of the Crown to consult First Nations. Consultation must accord with constitutional standards. Non-compliance can result in restriction of previously authorized third party undertakings. This can be costly and harmful to the industry. This paper assesses the prospects of a cause of action against the Crown in negligence as a potential avenue of compensation for third parties who suffer loss as a result of inadequate Crown consultation. The analysis incorporates relevant facts from several recent cases regarding 'Haida motions' and concludes that, in certain circumstances, such an action could succeed.

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