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Resource projects and Indigenous consultation – What is best practice after a year of uncertainty?

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In 2018, we saw the law of consultation evolve further after the release of new (and highly anticipated) decisions from the Supreme Court of Canada (SCC), the Federal Court of Appeal (FCA), and several provincial superior courts. Courts considered the duty to consult in the context of novel challenges/issues as well as nationally important infrastructure projects. However, despite this further judicial guidance, the uncertainty has increased. Messages from the various courts are not entirely consistent and indeed, our top court appears more internally divided than ever. Those of us who advise in the area are left with more questions than answers. How do proponents of resource and other national projects address the risks of a breach of the Crown's duty to consult? How are these developments in the law likely to impact investment and confidence in Canada? Is there a clear consultation standard?

Many economic and business commentators have highlighted these uncertainties as key contributors to the marked chilling of Canada's investment climate. To mitigate the risks of uncertainty, both governments and major resource project proponents should seek to exceed the consultation standard as currently articulated by Canadian courts. Unfortunately, that standard may not be obvious and is likely to develop further as our courts continue to consider these issues.

Consultation for major resource projects

The Crown's duty to consult Indigenous Peoples has attracted national and international headlines in recent years due to its prominent role in quashing major resource project approvals.

For example, in the 2016 decision in *Gitxaala Nation v. Canada* the FCA quashed federal approval of the Northern Gateway Project based on inadequate consultation. In 2018, the same Court in *Tsleil-Waututh Nation v. Canada (Attorney General)* recognized "significant improvements" in complying with the duty to consult compared to *Gitxaala*. The FCA nevertheless quashed the federal approval of the Trans Mountain Expansion Project (TMEP) on the basis that the consultation was not meaningful, did not represent true dialogue and did not engage the federal "decision-makers" (but instead, mere "note-takers" who simply recorded concerns and reported back). In both cases, while the Court did not find fault with the consultation structure/plan itself, it found that the Crown had failed in its execution of its Phase III obligations (which is the Crown consultation that occurs after the release of the NEB Report and before the project approval decision of the Governor in Council). Following the FCA's decision, the federal government took the unprecedented step of acquiring the pipeline company in order to get the pipeline built.

However, in 2018, there were some significant victories for major resource project

proponents. In contrast to *Tsleil-Waututh*, the British Columbia Supreme Court (BCSC) upheld the provincial consultation process regarding the TMEP in *Squamish Nation v British Columbia (Environment)*.

Additionally, the FCA in *Bigstone Cree Nation v. NOVA Gas Transmission Ltd.* upheld the federal cabinet's approval of the 2017 NGTL System Expansion Project, concluding (among other things) that the duty of consultation had been satisfied.

Bigstone provides a helpful framework for "deep" consultation. For major resource projects this includes:

- early, direct engagement between the proponent and Indigenous groups, prior to and in parallel with the regulatory process;
- partial reliance on a regulatory process that provides the following participatory rights for Indigenous groups: (1) notice; (2) funding; (3) written evidence; (4) oral traditional evidence, (5) information requests; (6) motions; and (7) final argument;
- early, direct engagement with the Crown, prior to, during and following the regulatory process;
- serious consideration of Indigenous rights and concerns, demonstrated through written explanations that reveal the impact those concerns had on decision-makers;
- addressing Indigenous rights and concerns through proponent commitments, project conditions, further studies and other accommodation or mitigation measures, where appropriate;
- reasons for decision that consider the adequacy of consultation; and,
- opportunities for future consultation that mandate responsiveness to outstanding or fresh Indigenous concerns throughout the life of the project.

SCC divided: The Crown's constitutional obligations during the legislative process

In its 2011 decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* the SCC left open "for another day" whether the duty to consult was triggered by legislative action. That day arrived on October 11, 2018, when the SCC released its reasons in *Mikisew Cree First Nation v. Canada (Governor General in Council)*. The appellants (Mikisew) challenged two pieces of omnibus legislation affecting Canada's environmental protection regime and asserted that the Crown owed it a duty to consult because the legislation had the potential to adversely affect Mikisew rights. The SCC answered (by a 7-2 majority) that the legislative process does not trigger the duty to consult. However, the SCC issued four sets of reasons: three sets of "majority" reasons and a two-judge dissent. The judgments reveal an alarming division within the Court and provide uncertain guidance to practitioners.

Ultimately, the Court was unanimous it would be *wise* for the Crown to consult on the development of legislation.

Resolving conflicting constitutional obligations

For the first time in Canada, a court was required to resolve a conflict between the Crown's modern treaty obligations to one Indigenous group and its duty to consult regarding the asserted claims of another. In, *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands &*

Natural Resource Operations), the potential conflict arose in the context of government decisions regarding the moose hunt. The affected land was subject to the Gitanyow Peoples' asserted Aboriginal rights and title but also overlapped with a portion of land where the moose harvest was regulated by a modern treaty between the Crown and the Nisga'a Nation.

To address the "very real conflict" between the twin constitutional obligations placed on the Crown, the Court modified the test for the existence of the duty to consult. Specifically, *the Court added a fourth factor*: whether recognizing a duty to consult Aboriginal Peoples who have asserted a claim for title and/or rights, in relation to the contemplated Crown conduct, would be inconsistent with the Crown's duties or responsibilities under a treaty.

The case, currently under appeal, should encourage prudent parties to consult *all* potentially affected Indigenous groups to understand and address concerns. This will assist in avoiding the unforgiving "correctness" standard of review that will be applied by the courts where the Crown asserts that the duty to consult is not triggered.

Consultation is a two-way street

Courts have repeatedly held that Indigenous groups have a reciprocal obligation to consult in good faith by using, on a timely basis, all consultation opportunities available to them.

In 2018, several courts were critical of a failure by Indigenous groups to consult in good faith. For example, in Bigstone, the FCA noted that the applicant First Nation "was not seriously engaged in the process" and that consultation opportunities were lost because of its "lack of engagement."

Similarly, in *Namgis First Nation v. Canada (Fisheries, Oceans and Coast Guard)*, the Federal Court held that, notwithstanding a "distinct lack of consultation on the part of the Minister," the applicant First Nation ought to be deprived of injunctive relief because of, among other things, its failure to engage in meaningful dialogue with the proponent about its urgent concerns.

Finally, in both *Council of the Haida Nation v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)* and *West Moberly First Nations v. British Columbia* the BCSC held that delays by the applicant First Nations were fatal to their claims for injunctive relief based on allegedly inadequate consultation.

Each of these cases demonstrates the importance of governments and proponents generating significant consultation opportunities for potentially affected Indigenous groups. While many questions remain, good faith consultation remains critical for *all* participants in the process.

Conclusion

In this time of uncertainty, both project proponents and governments must seek to exceed previous standards in recognition that concepts of "good faith" and "meaningful consultation," among others, may be in flux. In the meantime, the meaning and content of "good consultation" remains opaque, exacerbated by the decisions of the SCC and FCA. The result is added uncertainty about investing in Canada, which is one reason, among many, that investor confidence in our resource sector is currently at low ebb.