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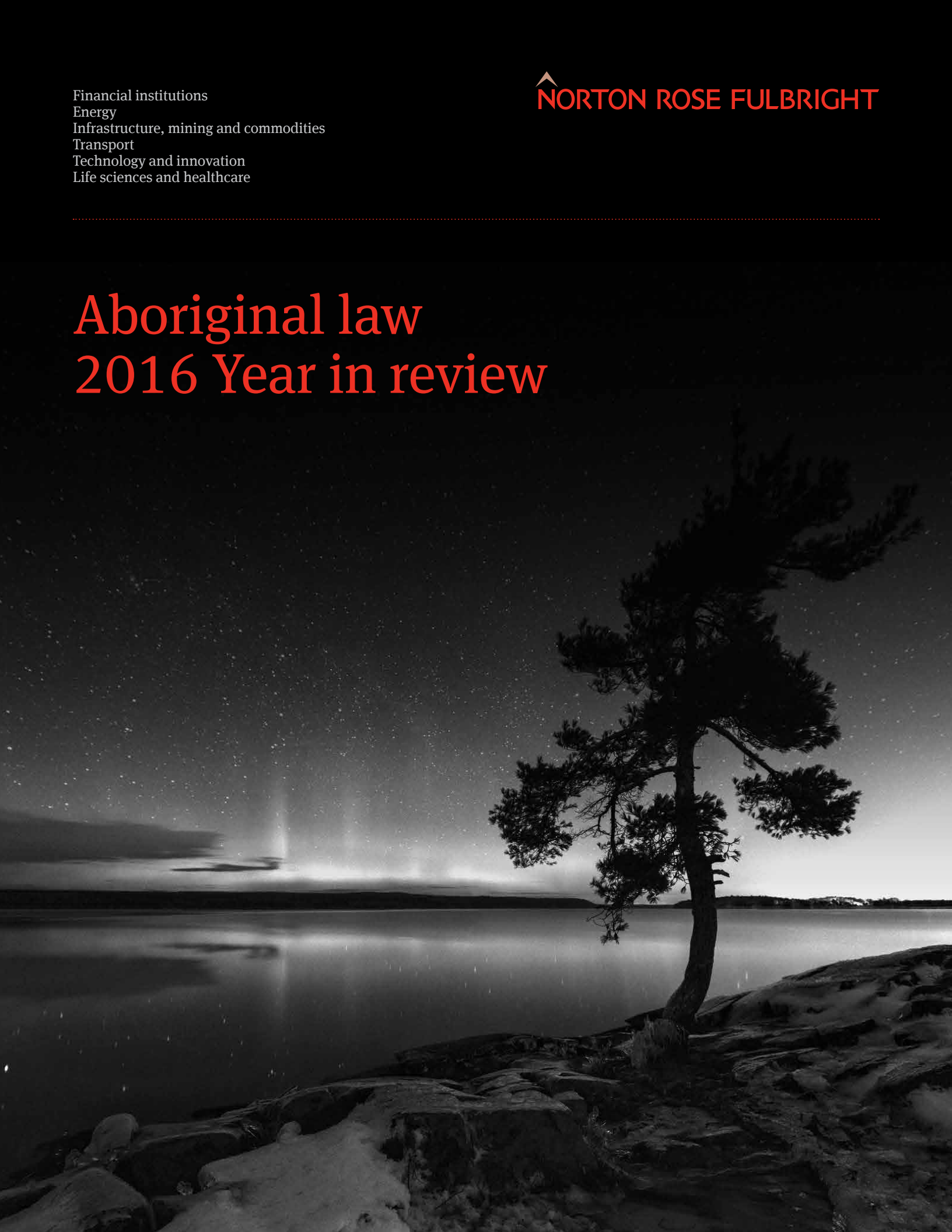
Aboriginal law 2016 Year in review



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Preface

On behalf of our Aboriginal law practice, we are pleased to share *Aboriginal law – 2016 Year in review*.

Aboriginal law – 2016 Year in review summarizes key decisions from across Canada that are relevant to industry and project proponents. These decisions reflect the most recent guidance from Canadian courts regarding the duty to consult Indigenous peoples, including three pending Supreme Court of Canada decisions.

As a result of the unique history of Canada's Indigenous population, legal considerations can vary significantly in different parts of the country. In recognition of this, the decisions are organized by jurisdiction.

For more information regarding the cases included in the publication and how they might affect your business operations, contact one of our regional Aboriginal law leaders.

2016 Cases we are following

British Columbia

Fort Nelson First Nation v. British Columbia (Environmental Assessment Office), 2016 BCCA 500

Duty to consult not triggered where the Crown interprets legislation

The First Nation challenged an Environmental Assessment Office (**EAO**) decision that a proposed frac sand mine project located in the First Nation's traditional territory was not subject to an environmental assessment under the *Environment Assessment Act*. Under the *Environmental Assessment Act*, environmental assessment was required where the project's anticipated production capacity exceeded a threshold set out in the *Reviewable Projects Regulation*. Based on the EAO's interpretation of "production capacity," the project would not be subject to an environmental assessment. The First Nation brought a petition for judicial review of the EAO's interpretation, arguing the EAO's interpretation was unreasonable and it failed to discharge its duty to consult when interpreting the legislative scheme.

The British Columbia Court of Appeal (reversing the decision of the chambers judge) held that the EAO's interpretation was not a "decision" amenable to judicial reconsideration. Moreover, the EAO's interpretation of the threshold was reasonable as it fell within a range of possible, reasonable outcomes. Finally, the court held that the EAO expressing an opinion on the proper interpretation of the legislative scheme did not trigger a duty to consult. Interpretation of a regulation was not "Crown conduct," and the EAO's conduct did not have an adverse effect on the First Nation's treaty rights. The duty to consult would be engaged when the decision was made as to whether or not to grant the permit for the project – not before.

Prophet River First Nation v. British Columbia (Minister of Forests, Lands and Natural Resource Operations), 2016 BCSC 2007

Judicial review challenge rejected because First Nations failed to meaningfully participate in the consultation process

Two First Nations sought judicial review of permits issued by the Province of British Columbia to the British Columbia Hydro and Power Authority to commence construction of a dam located on Treaty No. 8 lands.

The British Columbia Supreme Court dismissed the application, finding that the province provided the First Nations with opportunities to obtain information and engage in consultation throughout the project, but the applicant First Nations failed to take advantage of these opportunities. The applicant First Nations also failed to express any concerns that could reasonably have been accommodated in the permit approval process.

DNT Contracting Ltd. v. Abraham, 2016 BCSC 1917

Alleged breach of the duty to consult rejected as a defence to a blockade

The plaintiff logging company applied for an interim injunction restraining the First Nation defendants from blockading the service road leading to the plaintiff's operations. The First Nation defendants were dissatisfied with consultation leading up to the issuance of a logging permit.

The court granted the injunction as it met the three-part test set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311.

Importantly, the court held that asserting a breach of the duty to consult was not a defence to the blockade, which instead constituted an abuse of process. The proper forum for the First Nation's grievance was a judicial review application.

British Columbia Hydro and Power Authority v. Boon, 2016 BCSC 355

Project delays held to constitute irreparable harm justified the granting of an injunction

The British Columbia Supreme Court allowed BC Hydro's application to enjoin protestors (many of whom were Indigenous) from obstructing construction activities in an area it was licenced to develop. The court held that BC Hydro could suffer irreparable harm, as there was a risk the protestors' activities would delay the project by a year, and the balance of convenience favoured granting the injunction. The court noted if an injunction was not granted this would permit the protestors to collaterally attack BC Hydro's licences (which had survived prior judicial challenges).

Thomas v. Rio Tinto Alcan Inc., 2016 BCSC 1474

Canada/province added as necessary parties to a civil action grounded in asserted, but unproven, Aboriginal rights and title

The Supreme Court of British Columbia granted the defendant's application to add the federal and provincial Crown as defendants to an action brought by two First Nations against Rio Tinto Alcan Inc. for nuisance and wrongful interference with riparian rights resulting from the construction and operation of the Kenney Dam. While the Crown consented to the application, the plaintiff First Nations opposed it, arguing they were not seeking a formal declaration of Aboriginal title and therefore Crown participation was unnecessary. The First Nations also contended it would not be just or convenient to have the Crown participate as defendants.

The court held that the federal and provincial Crowns were necessary parties as proving the action would require the First Nations to establish they held Aboriginal rights and/or title to the lands and waters affected.

Alberta

Métis Nation of Alberta Association Fort McMurray Local Council 1935 v. Alberta, 2016 ABQB 712

Alberta Consultation Office decision quashed because of procedural unfairness

The Métis Nation of Alberta Association Fort McMurray Local Council 1935 argued that the Alberta Consultation Office (**ACO**) breached natural justice and/or procedural fairness in determining the local did not have a right to be consulted on a number of energy resource development applications. The ACO concluded it had insufficient information to establish that the local represented a rights-bearing community.

The Alberta Court of Queen's Bench held that, as the rights in question were constitutional, the degree of procedural fairness when determining whether the local was owed a duty to consult was high. The court found that the ACO had breached its duty of procedural fairness by arbitrarily imposing short deadlines for responding to requests for information. The ACO's decision was quashed and the court directed the ACO to reconsider whether the duty to consult was triggered.

Fort Chipewyan Métis Nation of Alberta Local #125 v. Alberta, 2016 ABQB 713

Indigenous group did not satisfy requirements to establish consultation rights

The Fort Chipewyan Métis Nation of Alberta Local #125 sought judicial review of the ACO's decision that it was not owed the duty to consult as it did not represent a rights-bearing group.

The Alberta Court of Queen's Bench held that the local did not provide sufficient information to satisfy the requirements for membership in a rights-bearing community as identified in *R. v. Powley*, 2003 SCC 43, (ancestral connection, self-identification, and community acceptance). The court also held that the local could not claim to be representative of the entire Fort Chipewyan Métis community, as its membership was less than one-fifth of the total population of the community and it did not have clear membership guidelines.

Siksika Nation v. Crowchief, 2016 ABQB 596

Freedom of expression challenge to interlocutory injunction enjoining blockade rejected

In this decision, the Alberta Court of Queen's Bench considered a *Charter* challenge to an interlocutory injunction application seeking to enjoin the First Nation from blockading the applicant's construction project. The First Nation argued the injunction would violate its freedom of expression under s. 2(b) of the *Charter*, which applied to any decisions, by-laws and actions of the First Nation band pursuant to the band's authority under the *Indian Act*.

The court accepted that, in certain circumstances, the *Charter* would apply to the acts of First Nation bands, but held that it did not apply here as the respondents were seeking to interfere with private construction contracts. The court further concluded that, even if the *Charter* did apply, the injunction would be justified under s. 1 of the *Charter*, as it only enjoined the respondent's tortious behavior and the blockade posed a risk of financial and societal harm.

Stoney Nakoda Nations v. Canada, 2016 ABQB 193

Claim for trespass and conversion dismissed for being filed after the expiration of the limitation period

Encana Corporation and the Canadian Pacific Railway Company (**CPR**) applied for summary dismissal on the basis that the action was brought after the expiry of the applicable limitation period. The action alleged, as against Encana and CPR, trespass and conversion of petroleum, natural gas and related hydrocarbons located on lands that had been set aside as reserve lands pursuant to Treaty No. 7. The First Nation also claimed against the Crown for an alleged breach of duties owed to the First Nation in the late 1800s and early 1900s, by transferring, without its consent, the oil and gas interests to CPR (which were later conveyed to Encana). The First Nation asserted that the transfers were invalid, unlawful, or ineffective.

The Alberta Court of Queen's Bench granted CPR's application and dismissed the claims against CPR: all claims seeking monetary damages were statute-barred and, as there was no evidence of CPR having any current interest in the *in situ* oil and gas interests, any claim for recovery of those interests, as against CPR, was "pointless." In so holding, the court rejected the First Nation's argument that limitation laws do not apply to Aboriginal claimants; applying the statutory limitation period did not have the effect of extinguishing any Aboriginal rights as the claims against CPR were for damages alone.

The claim against Encana was not struck, however, as the court concluded that the factual record before the court was insufficient to allow the fair and just resolution of the issues of alienation and indefeasibility.

Saskatchewan

Bear v. Saskatchewan (Government of), 2016 SKQB 73

Province was entitled to weigh public interest when deciding whether to grant a request made pursuant to a land entitlement agreement

The Saskatchewan Court of Queen's Bench confirmed that public interest considerations are relevant and necessary when considering whether to grant a First Nation's request made pursuant to a treaty land entitlement settlement agreement. The Muskoday First Nation argued that the Province of Saskatchewan had breached a 2007 treaty and entitlement agreement by refusing to sell it certain Crown land and minerals located at the First Nation's reserve. The refusal was based, in part, on a concern over the uncertainty the request would create for mineral disposition holders. The First Nation contended, among other things, that Saskatchewan was wrong to favour the public interest over those of the First Nation.

The court disagreed, holding that, while the honour of the Crown was applicable, the Crown has a duty to the public inasmuch as it has a duty to the First Nation; "[n]othing compels Saskatchewan to place one subgroup's interest ahead of everyone else's."

Peter Ballantyne Cree Nation v. Canada (Attorney General), 2016 SKCA 124

Provincial limitations provisions held applicable to civil claims based on Aboriginal rights

The Saskatchewan Court of Appeal held that the provincial *Limitations Act* is applicable to civil claims alleging a breach of the Crown's fiduciary duty, breach of the honour of the Crown and a breach of the duty to consult. The First Nation contended there was an operational conflict between the *Limitations Act* and the provincial *Interpretation Act*, as well as with federal legislation (the *Federal Real Property Act* and the *Indian Act)* with respect to claims relating to Aboriginal rights. The First Nation also argued that the *Limitations Act* was inapplicable because of the doctrine of interjurisdictional immunity.

The court rejected all arguments, finding there was no operational conflict or frustration of federal purpose in applying provincial limitations legislation to claims based on rights unique to Canada's Indigenous peoples.

Ontario

Michipicoten First Nation v. Minister of Natural Resources and Forests et al., 2016 ONSC 6899

First Nation application for judicial review dismissed because of delay in filing

The Ontario Supreme Court dismissed an application for judicial review of approvals of a wind farm project because the First Nation did not file its application until 15 months after the approval was issued. The First Nation caused further delays as a result of its failure to include all parties to the proceedings and its failure to provide its application record.

The court held that the First Nation's delay caused serious harm to the project proponents, who proceeded to complete the project and incurred millions of dollars in expenses.

In *obiter*, the court also held that the duty to consult was satisfied in any event. The First Nation had failed to provide evidence or to itemize its assertion that the project would cause non-compensable adverse impacts. The court commented that the First Nation had to do more than simply express a blanket concern that the project was located within its traditional territory without providing information on potential adverse impacts on its Aboriginal and treaty rights.

Northern Superior Resources Inc. v. Ontario, 2016 ONSC 3161

Project proponent's $110M claim against the province for failing to discharge duty to consult dismissed

The Ontario Superior Court of Justice dismissed Northern Superior's $110M claim against the Ontario Crown for business losses stemming from lost access to mining interests in the traditional territory of the Sachigo Lake First Nation. The losses were alleged to be the result of the Crown's breach of its duty of care around the duty to consult.

Northern Superior had partnered with the First Nation to explore a possible gold mining opportunity in its traditional territory. The seven-year partnership degraded in the final two years, ultimately terminating at the First Nation's request. Northern Superior then brought an action against the Crown alleging the failure of Northern Superior's relationship with the First Nation was caused by Ontario's inadequate consultation.

Northern Superior claimed the Crown failed in its constitutional responsibilities and those responsibilities benefitted not just First Nations but also third parties whose interests could be affected.

The court rejected Northern Superior's argument, stating the duties created by s. 35 were owed to the First Nation alone, and a corresponding duty to Northern Superior would be incompatible with the Crown's obligations to Indigenous peoples.

Northern Superior also argued that the Crown breached a duty of care it owed to Northern Superior. After examining the relationship between the Crown and Northern Superior, the court held that there was not a "sufficient relationship of proximity" between the parties to ground a duty of care.

Quebec

Uashaumnuat (Innus de Uashat et de Mani-Utenam) c. Compagnie Minière IOC Inc. (Iron Ore Company of Canada), 2016 QCCS 5133

Application to strike First Nation's action challenging mining project dismissed

The plaintiff First Nation sought damages in relation to the defendants' mining operations in Quebec and Newfoundland and Labrador, asserting they were located in its traditional territory. The action also sought a declaration confirming the First Nation's rights and title to the lands and a declaration that the defendants' projects were subject to First Nation's consent and were therefore illegal.

The defendants argued that the action should be struck because, among other things, the First Nation had not yet proven ancestral title and Quebec lacked jurisdiction to deal with allegations relating to projects located outside of Quebec. The Newfoundland government also claimed Crown immunity, arguing it could not be sued in another province.

The court rejected all arguments, holding that the First Nation did not need previously proven ancestral title to be successful, there was a real and substantial connection to Quebec, and Crown immunity did not bar the action as the plaintiff was not seeking a remedy against Newfoundland. The court also acknowledged the merit of the First Nation's claim, commenting that both the Quebec and Newfoundland governments ought to have consulted with the First Nation prior to authorizing the defendants' operations (even though authorization of the operations predated recognition of the concept of the duty to consult by the court).

Federal Court

Canada (Governor General In Council) v. Courtoreille, 2016 FCA 311

No duty on the Crown to consult when contemplating enacting or amending legislation

Overturning the Federal's Court's decision, the Federal Court of Appeal held that the duty to consult is not triggered where the Crown is contemplating enacting or amending legislation that may adversely affect treaty (or other Indigenous) rights. The duty to consult could only arise after legislation is enacted and not before.

The court also held that legislative action is not properly subject to judicial review under the *Federal Courts Act* and importing the duty to consult to the legislative process offends the doctrines of parliamentary sovereignty and the separation of powers, both of which are well-established pillars

of the Constitution. When ministers are engaged in the law-making process they are not acting as statutory decision-makers but as legislators, and any conduct undertaken in a legislative capacity is immune from judicial review.

Gitxaala Nation v. Canada, 2016 FCA 187

Governor in Council's approval of the Northern Gateway Project quashed based on Crown's failure to adequately consult

On judicial review, the Federal Court of Appeal quashed the order-in-council directing the National Energy Board to issue certificates of public convenience and necessity for the Northern Gateway Project. While the court upheld the order-in-council as reasonable, it was nonetheless quashed because the Governor in Council had failed to discharge the duty to consult.

Although the court specifically found that the project proponent consulted properly, the final phase of consultation undertaken by Canada was inadequate. Specifically, the court found that the timeline for the Governor in Council to complete consultation and render its decision was "arbitrarily short" and did not provide sufficient time for meaningful consultation. The court also found that some of the information put before the Governor in Council to aid in its decision was inaccurate and Canada was unwilling to take steps to correct this misinformation. The court found that the Crown was trying to implement a "one-size" fits all accommodation measure that did not truly address the unique concerns raised by each First Nation.

Tsleil-Waututh Nation v. Canada (National Energy Board), 2016 FCA 219

Court dismissed appeals where issues raised were not made before the NEB

The Federal Court of Appeal dismissed the First Nation's appeal of three NEB interlocutory decisions made in relation to the Trans Mountain pipeline. The issues raised by the First Nation on appeal included: whether the NEB has the authority and obligation to discharge the Crown's duty to consult; whether the NEB breached its legal obligation to offer to consult and collaborate with the First Nation as a "jurisdiction" within the meaning of s. 18 of the *Canadian Environmental Assessment Act 2012* (**CEAA 2012**); whether the NEB breached its duty of fairness to the First Nation by failing to obtain its comments on all the issues raised in the decisions; and whether the NEB erred in law by failing to include marine shipping activities that would likely result from exporting oil so as to widen the scope of factors to be examined under the CEAA 2012.

As the First Nation had failed to put these issues directly to the NEB and relied on evidence not before the NEB, the court held that it would be inappropriate for it to address them for the first time on appeal. As well, the decisions in issue were not final decisions and the First Nation had the opportunity to be heard on these issues in the future.

Buffalo v. Canada, 2016 FCA 223

Claims based on s. 35 constitutional rights are subject to provincial limitations legislation

The Federal Court of Appeal upheld the trial judge's decision granting summary judgment with respect to an action concerning oil royalties and taxes levied on oil produced on the Pigeon Lake Reserve (the **Reserve**) between 1973 and 1985. The plaintiff First Nations have interests in the Reserve and are parties to Treaty No. 6.

Canada brought a summary judgment application for the claims related to the royalties and taxes on the basis that the plaintiff First Nations knew of the facts giving rise to their claims more than six years prior to filing their statements of claim, and thus the matter was barred by virtue of the

Federal Courts Act and the *Limitations Act* (collectively, the ***Acts***). The Federal Court granted Canada's application (2015 FC 836).

On appeal, the First Nations argued, *inter alia*, that the trial judge erred in determining the *Acts* were constitutionally applicable and operable with respect to the claims in issue. The court dismissed the appeal, relying on the Federal Court's reasoning. On the question of the interaction between s. 35 of the *Constitution* and the *Acts*, the Federal Court reasoned that limitation periods do not extinguish constitutionally protected Aboriginal and treaty rights. They simply impose time limits on the commencement of legal proceedings.

Supreme Court of Canada

Three decisions of the Supreme Court of Canada were argued in 2016 and remain pending.

Ktunaxa Nation v. British Columbia (Minister of Forests), [2015] SCCA No 417

First Nations challenge proposed project based on freedom of religion rights

The First Nations challenged ministerial approval of a master development agreement for developing a ski resort. The First Nations argued that the approval violated their freedom of religion guaranteed under s. 2(a) of the *Charter* and breached the minister's duty to consult and accommodate asserted Aboriginal rights under s. 35 of the *Constitution*. The First Nations asserted that the proposed resort would be built in an area of paramount spiritual significance, being the Grizzly Bear Spirit's home or territory. The First Nations further argued that developing the resort would desecrate the land and irreparably harm their relationship with the Grizzly Bear Spirit, and would cause the spirit to leave the area leaving them without spiritual guidance.

The Supreme Court of British Columbia dismissed the petition for judicial review because s. 2(a) of the *Charter* did not confer a right to restrict the otherwise lawful use of land on the basis that such use would result in a loss of meaning to religious practices carried on elsewhere. The court also held that the process of consultation and accommodation was reasonable. The British Columbia of Court of Appeal dismissed the appeal.

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc, 2016 CanLII 12151

First Nation challenges consultation for NEB pipeline approvals

Enbridge applied to the National Energy Board for approval to reverse the flow of one section of an existing pipeline, expand the capacity of the pipeline, and exempt the project from certain regulatory requirements and procedures. The NEB approved the project on specified terms and conditions. The Chippewas of the Thames First Nation appealed the NEB's decision, citing, among other things, inadequate consultation.

A majority of the Federal Court of Appeal dismissed the appeal, finding that, in the absence of the Crown as a participant in the original application, the NEB was not required to determine whether the Crown was under a duty to consult, and if so, whether the duty had been discharged. The Federal Court of Appeal also held there was no delegation by the Crown to the NEB of any power to undertake the fulfillment of any such duty. In dissent, Rennie J.A. would have allowed the appeal, concluding the NEB was required to undertake a consultation analysis as a precondition to approving Enbridge's application.

Hamlet of Clyde River v. Petroleum Geo-Services Inc (PGS), [2015] SCCA No 430

Inuit municipality challenges NEB approval for inadequate consultation

The Hamlet of Clyde River applied for judicial review of the NEB's approval of a marine seismic survey program in coastal waters in Nunavut, arguing, among other things, Crown consultation was inadequate.

The Federal Court of Appeal dismissed the application, finding that the duty to consult had been satisfied. The NEB was statutorily mandated to undertake procedural elements of the First Nation consultation activities and to assess the sufficiency of consultation. The court held the Crown was entitled to rely on the NEB's regulatory process to help satisfy its duty to consult.

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