NORTON ROSE FULBRIGHT

Legal update

Case summary: Mikisew Cree First Nation v. Canada (Governor General in Council)

October 2018
Aboriginal

In *Mikisew Cree First Nation v. Canada (Governor General in Council),* the Supreme Court of Canada addressed whether the federal government was required to consult prior to passing environmental legislation that could affect the exercise of treaty and/or Aboriginal rights. In doing so, the court grappled with reconciling two constitutional principles – protection of Aboriginal rights and title versus the separation of powers and parliamentary sovereignty.

While agreeing on the issue of jurisdiction (which was dispositive of the claim), the judgment involved four concurring decisions. Ultimately, the majority of the court determined that the development, passage and enactment of legislation *does not trigger* the duty to consult.

Background

In April 2012, the minister of finance introduced two pieces of omnibus legislation, Bills C-38 and C-45, that altered Canada's environmental protection regime. The Mikisew Cree First Nation was not consulted on either bill. Mikisew brought an application for judicial review in the Federal Court, arguing that, as the legislation was developed by a cabinet member and could adversely affect Mikisew's treaty rights, Mikisew should have been consulted about the legislation.

At first instance, the Federal Court agreed with Mikisew and granted a declaration that the duty to consult was triggered and the Mikisew was entitled to both notice of and the opportunity to make submissions on the bills. On appeal, the majority of the Federal Court of Appeal held that where ministers develop bills in a legislative capacity, the doctrines of parliamentary sovereignty, the separation of powers, and parliamentary privilege preclude judicial review.

Jurisdiction

The Supreme Court of Canada unanimously held that the Federal Court did not have jurisdiction to consider the judicial review application, as the court was satisfied there was no statutory grant of jurisdiction enabling the Federal Court to review the passing of legislation.

Balancing the duty to consult and the separation of powers

The court's split reasoning leaves open the possibility of further challenges in this area of the law.

Majority Reasons

The majority of the court determined, in three separate sets of reasons, that forming and passing legislation does not trigger the duty to consult. Where the majority disagreed was the *extent to which* the courts can limit or restrict Parliament's power to pass legislation.

Four of the seven majority justices held that while courts have the power to nullify enacted legislation that is inconsistent with Canada's Constitution (*Sparrow*) and/or quash executive decisions based on that legislation (*Haida*), the courts cannot rule on challenges to the process by which that legislation is formulated, introduced or enacted.[1] Consequently, while it may be good government practice to consult Indigenous groups before passing legislation, it is not legally required[2] and the honour of the Crown does not bind Parliament.

In contrast, the remaining three majority justices held that "[s]imply because the duty to consult doctrine, as it has evolved to regulate executive conduct, is inapplicable in the legislative sphere, does not mean the Crown qua sovereign is absolved of its obligation to conduct itself honourably."[3] Instead, declaratory relief could be appropriate where legislation is enacted that is inconsistent with the honour of the Crown and "other protections may well be recognized in future cases."

Minority Reasons

A minority of the court concluded that enacting legislation with the potential to adversely affect Aboriginal rights (1) does give rise to a duty to consult; and (2) may be challenged directly for relief if it is enacted in breach of that duty. This is because "[t]he legislative sphere is not excluded from the honour of the Crown, which attaches to all exercises of sovereignty."[4]

In effect, the minority supported a proactive approach to protecting treaty and Aboriginal rights, in that "[o]ngoing consultation is preferable to the backward-looking approach of subsequent challenges, since it protects s. 35 rights from irreversible harm and enhances reconciliation."[5] Even so, limits would exist on the duty to consult during the legislative process, in that it would only be triggered where the legislation being developed has sufficiently foreseeable potential to adversely affect an Aboriginal right.[6]

Conclusion

By virtue of the separate sets of reasons issued by the court, there may be some uncertainty in this area going forward. While seven of the nine justices agreed that the duty to consult is not triggered during the law-making process, a separate majority contemplated court challenges where the enactment of legislation was inconsistent with the honour of the Crown. This may invite future challenges not only to legislation passed by the federal government, but also by the provinces.

Moving forward, companies operating in the Indigenous law space should be aware that Indigenous groups continue to have varied avenues to challenge government decisions, including seeking:

- judicial review of government approvals on the basis that the duty to consult was not met during the approval process set-up by validly enacted legislation;
- judicial review of enacted laws that infringe on the s. 35 protections guaranteed by the Constitution and are not justified under the *Sparrow* test; and
- declaratory relief where potential legislation may adversely affect a treaty and/or Aboriginal right.

Again, while it was held that there was no constitutional *requirement* to consult prior to passing legislation, the court unanimously endorsed the value and wisdom of consulting Indigenous groups prior to enacting legislation. Accordingly, this decision will likely raise the expectations by Indigenous groups that they be consulted as part of the legislative process.

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Footnotes

1 *Ibid* at para 124.

2 *Ibid* at para 166.

3 *Ibid* at para 52.

4 *Ibid* at para 78.

5 *Ibid* at para 78.

6 *Ibid* at para 92.

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