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NORTON ROSE FULBRIGHT

Indigenous law 2018 Year in review

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Preface

On behalf of our Indigenous law practice, we are pleased to share the Indigenous law – 2018 Year in review.

The report summarizes the latest developments in Indigenous law, organized by jurisdiction. These decisions reflect the most recent guidance from Canadian courts regarding the relationship between Aboriginal title claims and fee simple title, the duty to consult, and injunctive relief.

Knowledge of the current trends in Indigenous law and latest judicial commentary on the scope and content of the duty to consult will help project proponents formulate best practices to avoid projects being delayed as a result of judicial challenges citing insufficient consultation.

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

Summary

2018 saw several important decisions in the area of Indigenous law, as well as the emergence of some interesting trends to watch for in 2019.

Importantly, the Supreme Court of Canada's split decision in *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 has left uncertainty with respect to whether remedies are available as against the legislature. 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 is inconsistent with the honour of the Crown. We expect this case may invite new challenges to government decisions.

The Federal Court of Appeal's decision in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 with respect to the Trans Mountain Expansion Project again underscores the importance of independent consultation by the Crown following a hearing before the National Energy Board (NEB), which is also where the Federal Court of Appeal concluded consultation fell short with respect to the Northern Gateway Pipeline project. While Canada can rely on the NEB's process to fulfil the Crown's duty to consult, it cannot do so inflexibly.

In 2019, we expect to see the Court address the growing tension between hereditary chiefs and elected councils in certain First Nations, as well as the relationship between Aboriginal title and fee simple title.

Finally, there are several issues we expect will continue to trend throughout 2019, including the influence of:

(a) the United Nations Declaration on the Rights of Indigenous Peoples;[1]

(b) the Truth and Reconciliation Commission of Canada's Final Report;[2] and

(c) the Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples on the evolution of Indigenous law.[3]

The cases we are following section summarizes key court decisions considering significant Indigenous law topics from across Canada.

[1] The United Nations Declaration on the Rights of Indigenous Peoples, commonly referred to as UNDRIP, is an international instrument adopted by the United Nations in 2007. One of the key concepts adopted in UNDRIP is that of "Free, Prior and Informed Consent" or "FPIC" which some argue provides Indigenous groups with a veto right over project development in its traditional territory. Canada became a signatory of UNDRIP in 2016. The Province of British Columbia has committed to implementing UNDRIP principles in B.C.

[2] The Truth and Reconciliation Final Report focuses on the legacy of the Indian Residential Schools and involves 94 calls to action for further reconciliation between Canadians and Indigenous peoples, including the full implementation of UNDRIP.

[3] The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples is designed to "[promote] our Government's commitment to reconciliation by establishing guidelines that every litigator must follow in the approaches, positions, and decisions taken on behalf of the Attorney General of Canada in the context of civil litigation regarding section 35 of the Constitution Act, 1982 and Crown obligations towards Indigenous peoples.

2018 Cases we are following

Supreme Court of Canada

Mikisew Cree First Nation v Canada (Governor General in Council), 2018 SCC 40
Giesbrecht v British Columbia, 2018 BCSC 822

The development, passage, and enactment of legislation does not trigger the duty to consult

Following the introduction of Bills C-38 and C-45 in 2012, which altered Canada's environmental protection regime, the Mikisew Cree First Nation brought an application for judicial review in the Federal Court arguing that it should have been consulted with respect to the legislation. The Federal Court agreed and granted a declaration that the duty to consult was triggered. On appeal, the majority of the Federal Court of appeal held that judicial review was precluded as the Federal Court did not have jurisdiction to consider the judicial review application.

The Supreme Court of Canada unanimously agreed with the Court of Appeal on the issue of jurisdiction, disposing of the appeal. However, the Court was split in its obiter reasoning regarding the extent to which the judiciary may be able to limit or impose upon Parliament's legislative powers.

Four of the seven majority Justices held that while courts have the power to nullify enacted legislation that is inconsistent with Canada's Constitution and quash executive decisions based on that legislation, courts cannot rule on challenges to the process by which that legislation is formulated, introduced or enacted. Consequently, consultation with Indigenous groups before passing legislation is not legally required and the honour of the Crown does not bind Parliament.

In contrast, the remaining three majority Justices held that, simply because the duty to consult doctrine is inapplicable in the legislative sphere, does not mean the Crown is absolved of its obligation to conduct itself honourably. Instead, declaratory relief could be appropriate where legislation is enacted that is inconsistent with the honour of the Crown.

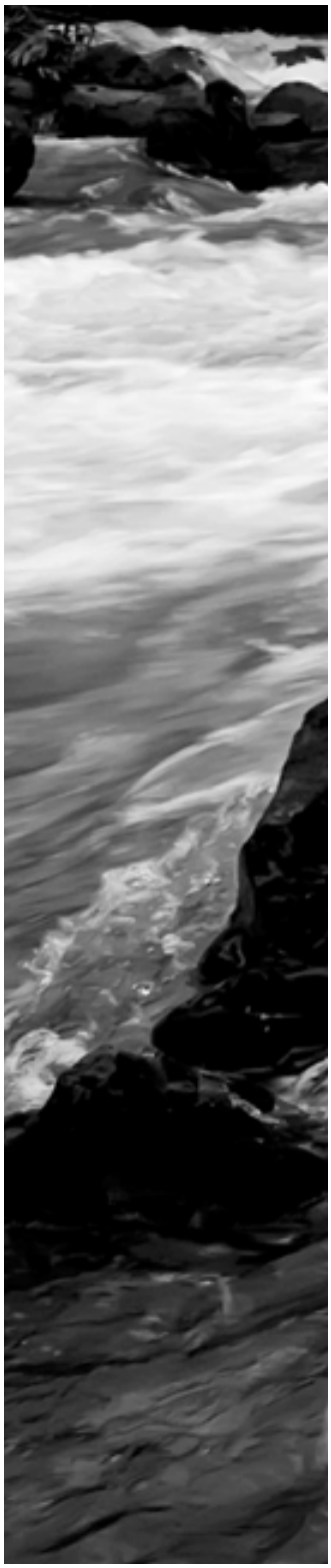
Finally, a minority of the Court concluded that the enactment of legislation with the potential to adversely affect Aboriginal rights does give rise to a duty to consult and may be challenged directly for relief if it is enacted in breach of that duty.

British Columbia

Giesbrecht v British Columbia, 2018 BCSC 822

Court refuses to strike novel defence to Aboriginal title claim relating to competing claims of Aboriginal title and fee simple title

The plaintiff First Nation commenced an action claiming Aboriginal title within the Coquitlam watershed, which included both Crown lands and lands held in fee simple by the Greater Vancouver Regional District and others. The Province and Vancouver defended the action, in part, stating that the First Nation's title to the area "was displaced by the fee simple title or similar interest granted." Vancouver also argued that the First Nation's title to the area, if it ever existed, was extinguished prior to 1982.



The First Nation applied to strike these portions of the Statements of Defence on the basis that Vancouver cannot meet the test to establish "extinguishment" of Aboriginal title over the claim area and "displacement" is not a defence at law. The First Nation argued it was appropriate to strike these portions of the pleadings to avoid "time consuming and expensive side trips" into defences with no reasonable prospect of success.

The Court ultimately rejected the application, stating that there is no binding authority in which the relationship between Aboriginal title to land and Crown grants of title in fee simple has been squarely addressed – as such, it was not certain that the defence of displacement was destined to fail. The Crown went on to state that the law has not reached "a state of stasis on the relationship between Aboriginal title and fee simple title" and that "[i]n the modern era of the assertion of Aboriginal rights and of Aboriginal title, the law has evolved to a considerable extent and there is no reason to believe that that evolution will not continue."

Importantly, in the course of its reasons, the Court made reference to the Truth and Reconciliation Commission of Canada's recent Summary of the Commission's Final Report, as well as the United Nations Declaration on the Rights of Indigenous Peoples.

Gamlaxyeltxw v British Columbia (Minister of Forests, Lands and Natural Resource Operations), 2018 BCSC 440

Conflicts between Treaty obligations and the duty to consult with respect to asserted rights

The petitioner hereditary chiefs, who assert Aboriginal title and rights, alleged that the Minister of Forest, Lands and Natural Resource Operations failed in its duty to consult them with respect to decisions regarding moose hunting in the Nass Wildlife Area, a geographical area defined in the Nisga'a Final Agreement. The Court was therefore asked to resolve the conflict between the constitutional obligations of the Crown related to the Nisga'a Treaty and the duty to consult with respect to asserted rights and title.

The Court held that the legal principles for ascertaining the existence of the Crown's duty to consult must be modified when the land or resources subject to an asserted claim overlaps land or resources governed by a modern treaty. The Court added a fourth step to the existing legal test: the Treaty will take precedence over asserted claims if the recognition of a duty to consult is inconsistent with the Crown's obligations or responsibilities to the Indigenous peoples with whom it has a Treaty. The Court considered that this modification to the legal test is consistent with the constitutional status of a Treaty, the honor of the Crown in entering the Treaty, and the Nisga'a acceptance that the Treaty exhausted all their claims to title and rights.

Council of the Haida Nation v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development), 2018 BCSC 1117

Application for interlocutory application dismissed in part due to delay on the part of First Nation

The Council of the Haida Nation sought an interim order staying certain logging permits.

While the Court was satisfied that there was a serious issue to be tried and that the First Nation would suffer irreparable harm if the application was refused, it ultimately dismissed the application, holding that the balance of convenience favoured against ordering the stay. In reaching this decision, the Court considered the economic loss and potential loss of employment that could occur to the logging company and its employees. Importantly, the Court also found that the Haida Nation knew for several years that the logging company intended to log in the area but failed to commence any proceeding until after the company began its operations.

Husby Forest Products Ltd. v Jane Doe, 2018 BCSC 676

Interlocutory injunction granted to end blockade

The defendants, a group of Indigenous people who refer to themselves as the "Haida Gwaii Land Protectors", erected a blockade preventing road access to a logging operation. The logging company successfully sought an injunction to end the blockade.

In finding irreparable harm, the Court emphasized the serious consequences of the blockade to the logging company, which included mounting thrown away costs of over C$250,000, as well as $300,000 in paid wages for no work. While the harm was monetary, the Court held that it was nevertheless irreparable as there was no reason to believe the defendants would be able to pay any damages award. Recognizing that the defendants had no legal right to blockade, the Court was satisfied that the balance of convenience favoured granting the injunction.

Hwlitsum First Nation v Canada (Attorney General), 2018 BCCA 276

Standing for a representative action denied where group incapable of clear definition

This appeal concerned the standing of an Indigenous group to advance a representative action claiming Aboriginal rights and title.

The British Columbia Court of Appeal held that the group did not meet the test for standing to claim Aboriginal rights and title because the proposed group was not capable of clear definition. Aboriginal rights and title are vested in the community. Accordingly, they cannot be claimed by a subset of the community, to the exclusion of others from that community.

Squamish Nation v British Columbia (Environment), 2018 BCSC 844

Constitutional limits of jurisdiction taken into account when assessing consultation

The Squamish Nation brought a petition challenging the adequacy of consultation by the Government of British Columbia in regards to (i) the issuance of an Environmental Assessment Certificate to the Trans Mountain Pipeline Expansion Project, and (ii) an agreement with the National Energy Board, allowing British Columbia to use the results of the NEB's environmental assessment on the project when issuing the Certificate.

In assessing consultation, the Court took note of the constitutional constraints to British Columbia's consultation efforts given that the project was under federal jurisdiction. The Court was satisfied that British Columbia consulted to the limit of their jurisdiction.

Trans Mountain Pipeline ULC v Mivasair, 2018 BCSC 1239

Intermittent and selective enforcement of an injunction is no defence for disobeying it

An injunction was granted March 15, 2018 preventing anyone from "physically obstructing, impeding or otherwise preventing access by Trans Mountain Pipeline ULC (**Trans Mountain**), its contractors, employees or agents" in the listed work sites, which included the Burnaby Terminal.

After the injunction was granted, four individuals attached themselves to the entry gate to the Burnaby Terminal in breach of the injunction. The individuals were charged and three were convicted of criminal contempt of court. The Court rejected the argument that evidence of intermittent and selective enforcement of the injunction by Trans Mountain was any defence for disobeying it.

William v British Columbia, 2018 BCSC 1271 and William v British Columbia, 2018 BCSC 1425

Interlocutory injunction granted pending judicial review decision that was ultimately dismissed

A group of Indigenous petitioners sought an order quashing the Province's decision to approve an exploratory program proposed by Taseko Mines Ltd. in an area to which Tshilhqot'in Nation holds proven Aboriginal rights.

They also sought an interlocutory injunction to prevent Taseko from undertaking a drilling program pending determination on the judicial review application.

Interestingly, the Court granted the interlocutory injunction (holding that encouraging reconciliation outweighed the public interest in enhanced economic activity), yet ultimately dismissed the judicial review application. The Court held that there was no basis to interfere with the Province's decision as it did not fall outside the range of reasonable outcomes and consultation was adequate.

Ontario

Eabametoong First Nation v Minister of Northern Development and Mines, 2018 ONSC 4316

While Crown has right to change consultation process, it cannot compromise the objectives of consultation

The applicant First Nation successfully sought judicial review of an exploration permit granted by the Director of Exploration for the Ministry of Northern Development and Mines authorizing mine exploration in the First Nation's traditional territory on the basis of inadequate consultation.

The Court found that the Crown changed course during the consultation process without providing any explanation to the First Nation, which gave rise to the First Nation's perception that the Ministry had shifted its focus away from meaningful and genuine consultation. The Court explained that the Ministry has the right to change the course of a consultation process, in spite of the expectations that may have been created. However, where it elects to change the course of consultation, it must do so in a way that does not compromise the objectives of the duty to consult – namely, upholding the honour of the Crown by attempting to further the goal of effecting reconciliation between the Crown and Indigenous people.

Federal Court

Namgis First Nation v Canada (Minister of Fisheries, Oceans and the Canadian Coast Guard), 2018 FC 334

Interlocutory injunction refused due to lack of warning

The applicant First Nation sought an interlocutory injunction against both the Minister and Marine Harvest Canada Inc. pending a determination in its application for judicial review with respect to a Fisheries and Oceans Canada policy not to test fish for certain diseases prior to issuing transfer licenses. As against Marine Harvest, the First Nation sought an order enjoining it from introducing, releasing or transferring fish into open water pens.

The parties agreed that there was a serious issue to be tried and the Court was satisfied that the First Nation had established a serious risk of irreparable harm. However, the Court ultimately held that that the balance of convenience favoured refusing the injunction. The First Nation had failed to provide any warning about its intent to seek injunctive relief and, as a result, the fish that were to be transferred had nowhere else to go. Failure to transfer the fish would amount to approximately C$2.1 million in damages to Marine Harvest.

Federal Court of Appeal

Tsleil-Waututh Nation v Canada (Attorney General), 2018 FCA 153

Unwavering reliance on the National Energy Board process will not satisfy duty to consult

The Tsleil-Waututh Nation et al. brought an application for judicial review of an Order in Council approving the Trans Mountain Expansion Project. The Federal Court of Appeal quashed the approval of the project and remitted it to the Governor in Council for redetermination.

The Court held that the Governor in Council failed by unreasonably relying on the National Energy Board's report, which recommended approval of the project. The Court found that the NEB report made a "critical error" at the project scoping stage by unjustifiably excluding the potential increase in tanker traffic from the scope of its review of the project.

The Court also held that Canada failed to adequately discharge its duty to consult and accommodate. Specifically, Canada failed to meet its duties in the third phase of the consultation process, which involved the Governor in Council's consideration of the project following the NEB hearing. The Court explained that, although Canada could rely on the NEB's process to fulfil the Crown's duty to consult, it could not do so unwaveringly. When real concerns were raised about the hearing process or the NEB's findings, Canada was required to dialogue meaningfully about those concerns.

In addition, the Court held that Canada erroneously operated on the basis that it could not impose additional conditions on Trans Mountain on top of the conditions recommended by the NEB, which seriously limited the scope of its consultation.

Finally, the Court held that the late delivery of Canada's assessment of the project's impact (until after all but one consultation meeting had been held with the Indigenous applicants) contributed to the unreasonableness of the consultation process.

Bigstone Cree Nation v Nova Gas Transmission Ltd., 2018 FCA 89

The Crown is under no obligation to provide funding for consultation

The Bigstone Cree Nation brought an application for judicial review challenging, among other things, the decision of the Governor in Council to grant a Certificate of Public Convenience and Necessity authorizing the 2017 Nova Gas Transmission Ltd. System Expansion Project.

The Federal Court of Appeal dismissed the application. The Court rejected the First Nation's argument that insufficient time was provided for post-National Energy Board consultation, finding that the First Nation had been given approximately four months for that stage of the consultation process.

The Court also rejected the First Nation's argument that insufficient funding hindered its ability to meaningfully participate in consultation. The Court stated that the Crown is under no obligation to provide funding; at best, funding is one factor to consider when assessing whether consultation is

meaningful. Here, the First Nation failed to identify how the purported lack of funding impacted its participation in the consultation process or how much additional funding would have been necessary for meaningful consultation.

Tsleil-Waututh Nation v Canada (Attorney General), 2018 FCA 155

Confidential information shared during negotiations cannot be used in response to judicial review

The applicant First Nation objected to an affidavit filed by Trans Mountain in the judicial review application of the Trans Mountain Expansion Project on the basis that it included confidential information communicated to Trans Mountain during negotiations surrounding the project.

The Federal Court of Appeal held that information contained in the affidavit was confidential in nature and therefore Trans Mountain's inclusion of that information constituted a breach of confidence. The Court therefore struck the affidavit. Nevertheless, the Court cautioned that the First Nation could not rely on the absence of this affidavit evidence to argue that Trans Mountain's engagement efforts had fallen short of the required standard.

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