NORTON ROSE FULBRIGHT

Indigenous law update

Review of recent cases
July 2020

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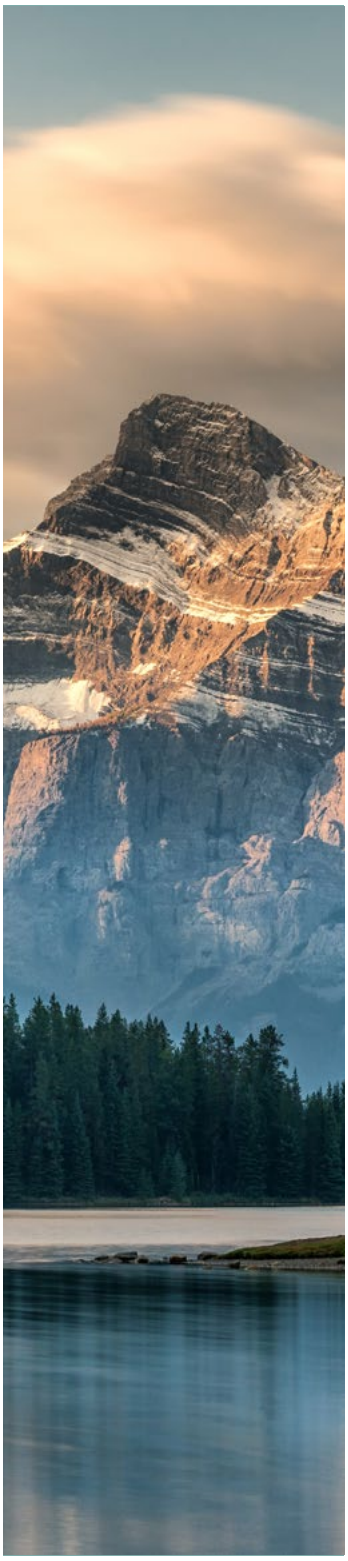


Summary

Over the course of 2019 and first half of 2020, there have been a number of significant developments in Canadian law relating to Indigenous people and their rights and interests in lands.

This publication summarizes a number of key decisions dealing with:

- the evolving case law on the duty to consult on projects and decision-making;
- granting or dismissing injunctions in the context of project development and blockades;
- procedural issues affecting ongoing litigation in this area; and
- section 35 rights treaty and Aboriginal rights.

Indigenous law is a broad and complex area, and we note that this publication is not a comprehensive list of every important case. Significant matters continue to be considered and decided by the courts, including the approval of the Trans Mountain Pipeline expansion project and the federal government's late-stage consultation process, both of which were affirmed by the Federal Court of Appeal.

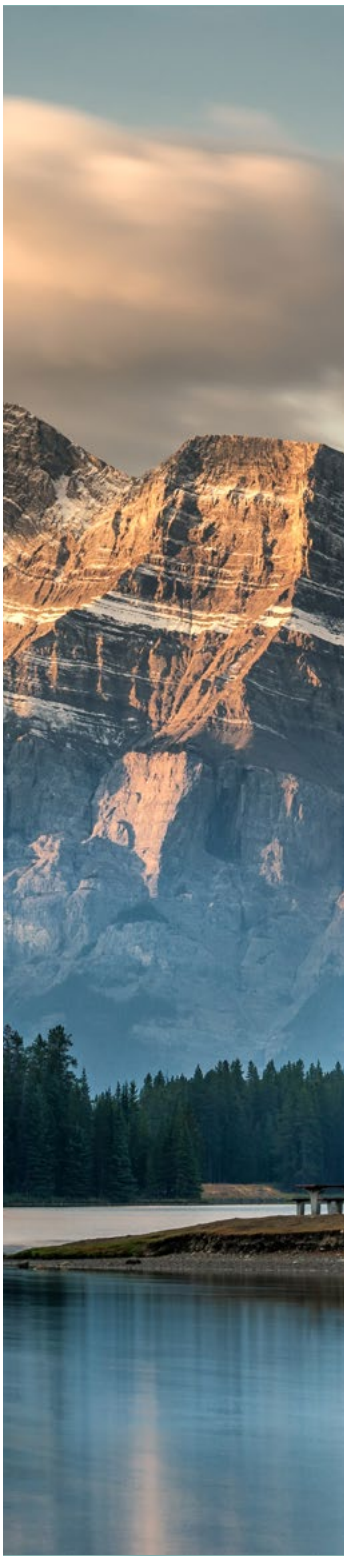
Two other trials that are underway before the Supreme Court of B.C. are expected to have significant implications on Aboriginal law in Canada once they are decided[1]. In *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc et al*, the plaintiff First Nations advance a claim for Aboriginal rights and title, and also seek relief against a private corporation based on common law tort claims predicated on those asserted rights in connection with a dam constructed in 1952. In *Yahey v. British Columbia*, the Blueberry River First Nation is suing the province of B.C., alleging that it has breached its treaty obligations and fiduciary duties as a result of the "cumulative effects" of industrial development in the nation's traditional territory.

While courts have reaffirmed that Indigenous groups do not have a veto over project development as part of the duty to consult and accommodate, governments continue to grapple with the concept of "Free, Prior and Informed Consent (FPIC)," and whether it ought to be a requirement for project development, federal Bill C-262, which would have affirmed the United Nations Declaration on the Rights of Indigenous Peoples (including the concept of FPIC) as a universal international human rights instrument with application in Canadian law, died on the Senate floor in June 2019. British Columbia's Bill 41, the *Declaration on the Rights of Indigenous Peoples Act*, came into force in November 2019.

As demonstrated by the protests over the Coastal GasLink pipeline project as well as decisions from Canadian courts, the concept of consent remains elusive when there is disagreement among, and even within, First Nations regarding support for a project. Competing and potentially irreconcilable claims for authority over First Nations lands, both between and within First Nations, continue to create uncertainty for project proponents.

For more information on any of these cases or other Indigenous law issues, please contact any member of Norton Rose Fulbright Canada LLP's Indigenous law team.

[1] *As of the date of publication, both cases have been adjourned as a result of the COVID-19 pandemic.*



1. Consultation, projects and decision making

Coldwater First Nation v. Canada (Attorney General), 2020 FCA 34
Judicial review application of Trans Mountain Expansion Project dismissed

Six of 12 applicants were granted leave to judicially review the June 18, 2019, Order-in-Council approving the Trans Mountain Pipeline expansion project pursuant to section 55 of the National Energy Board Act on the narrow issue of whether the Crown adequately consulted Indigenous peoples between quashing the first Order-in-Council approving the project and its subsequent re-approval (2019 FCA 224).

The court held that the question before it was narrow: whether, based on the reinitiated consultation, Canada's approval decision was defensible. In effect, the court was not to determine whether Canada could have come to a different conclusion that the court preferred or whether consultation could have been longer or better. Instead, Canada (or the relevant decision maker) is to judge the adequacy of consultation, while the court considers whether that determination is reasonable. While the same standard was applied in previous related Federal Court of Appeal decisions, this decision emphasized that a reviewing court's role is not to act as an "academy of science" in relation to the potential environmental impacts of a project.

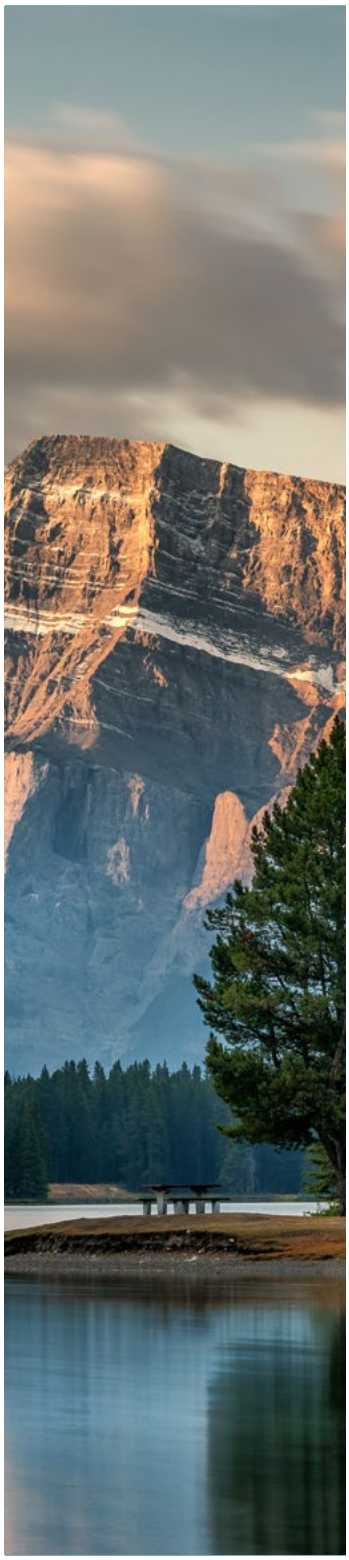
The court ultimately found Canada's approval decision was reasonable and "anything but a rubber-stamping exercise." In so doing, the court noted Canada's Consultation and Accommodation Report demonstrated Canada understood its duty to consult, took its duty seriously, and took steps to remedy the court's prior concerns regarding the consultation process. Reasonable consultation only requires Canada to "show that it has considered and addressed the rights claimed by Indigenous peoples in a meaningful way"; it does not require agreement.

The court also confirmed the overarching principles of the duty to consult:

- Consultation and reconciliation do not dictate any particular outcome, and while the goal may be to reach an overall agreement, reconciliation can be advanced whether or not that is obtained so long as consultation is based on a relationship of mutual respect.
- Indigenous groups do not have the right to veto projects based on asserted rights.
- Reconciliation requires both the Crown and Indigenous groups to "commit to the process, avoid counterproductive tactics, get to the substance of the issues of concern, and exercise good faith." Perfection in the consultation process is not required by law.
- Where there is continued opposition to a project after adequate consultation has taken place, Indigenous concerns must be balanced against competing societal interests, through accommodation. This balancing exercise can be delegated to administrative agencies.

Three of the six applicants who were granted leave to judicially review the Order-in-Council have sought leave to appeal the FCA's decision to the Supreme Court of Canada. Of the six applicants who were not given standing before the FCA, three sought leave to appeal to the Supreme Court of Canada, but all three applications were dismissed.

Leave to Appeal to the Supreme Court of Canada Dismissed



Morton v. Canada (Fisheries and Oceans), 2019 FC 143
Duty to consult includes an ongoing consideration of evolving science

The 'Namgis First Nation sought judicial review of a Department of Fisheries and Oceans policy decision to issue licences for transfers of live salmon into the marine environment without requiring screening for certain pathogens and diseases. The First Nation claimed that the minister acted in bad faith and breached its duty to consult in enacting the policy. Additionally, the First Nation sought to quash a specific licence issued by the department under the policy to a salmon farm operator.

The Federal Court quashed the policy, finding it was unreasonable and inconsistent with the standard required by the *Fishery (General) Regulations*. Specifically, the court held the policy did not follow the precautionary principle, that where there is a risk of serious or irreversible harm, a lack of scientific certainty should not be used as a reason for postponing or failing to take reasonable and cost-effective conservation and management measures to address that risk. The policy was remitted to the minister for reconsideration.

The court also determined that the minister breached its duty to consult the First Nation because the policy had the potential to adversely affect its rights. While there was consultation when the federal licensing regime was initially implemented in 2010, the department diverged from its self-stated practice of ongoing consultation concerning aquaculture licences, and also failed to take into account the rapidly evolving science on the matter.

With respect to the specific licence, the court clarified that the duty to consult does not arise for every individual transfer license. Moreover, the licence had expired by the time the decision was rendered and, accordingly, the court refused the First Nation's request that it be quashed. The court also dismissed the First Nation's request for an order to remove the fish already transferred pursuant to the licence, leaving it to the minister to decide appropriate steps following reconsideration of the policy.

William v. British Columbia (Attorney General), 2019 BCCA 74
Lack of consent from a First Nation is not evidence of inadequate consultation

Chief William, a member of the Tsilhqot'in Nation, appealed the chambers judge's decision to dismiss its petition for judicial review on the basis that the province's approval for Taseko Mines Limited to carry out exploratory drilling work in Tsilhqot'in's traditional territory (the permit) was reasonable and that the province had met its duty to consult and accommodate in a procedurally fair manner.

In upholding the chambers judge's decision, the B.C. Court of Appeal stated that having an honest disagreement over whether a project should be permitted to proceed is not, on its own, evidence of inadequate consultation, or that the Crown acted dishonourably. "The focus is not on the outcome, but on the process of consultation and accommodation."

Leave to appeal to the Supreme Court of Canada was dismissed with costs.

Redmond v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development), 2020 BCSC 561
Judicial review dismissed as decision-maker appropriately considered reconciliation, balancing of interests, freedom of religion, and state's duty of neutrality

The petitioner Redmond sought judicial review of the decision to disallow his application for a Crown land tenure. The petitioner sought the land tenure to build a small, run-of-the-river hydroelectric power plant. The land tenure falls within the traditional territory of several First Nations. The Crown consulted some of the First Nations regarding the project's potential impact on their rights and interests. The Cheam First Nation objected to the project because of the project's impacts on cultural practices that were specific to the creek on which the project would be located.

The petitioner argued that the decision-maker erred in applying the duty to consult during the decision-making process by failing to consider competing public interest considerations, accepting the Cheam's view that the project would negatively impact their spiritual practices, and effectively granting the Cheam an impermissible veto. The petitioner further argued that his Charter rights were violated, in part because the decision-maker prioritized "aboriginal spirituality."

Masuhara J. dismissed the petition. The decision-maker had the authority to consider the decision's overall impact on the public's interest in achieving reconciliation. The decision-maker reasonably concluded that while there was no duty to reach an agreement with the Cheam, the Crown's obligation to avoid irreparable harm weighed heavily in favour of disallowing the application. Rather than an impermissible veto, the decision reflected a balancing of interests.

Further, the record supported the decision to accept the Cheam's assertion that the project would negatively impact their spiritual practices, even if the petitioner felt otherwise. Applying the Doré framework, the decision recognized the Cheam's spiritual practices would be affected by the project, but did not indicate preference for the Cheam's spiritual beliefs over the petitioner's atheism.

Nova Scotia (Aboriginal Affairs) v. Pictou Landing First Nation, 2019 NSCA 75
Duty to consult extends to decision to fund project development

The Province of Nova Scotia appealed a successful judicial review application brought by a First Nation challenging the Office of Aboriginal Affairs' decision to deny consultation on whether the province would provide funding to Northern Pulp Nova Scotia Corporation (Northern Pulp) for the construction of a new effluent treatment facility in Nova Scotia. Northern Pulp applied for, and was granted, leave to intervene in the appeal (2019 NSCA 12).

The Nova Scotia Court of Appeal upheld the lower court's decision that the minister was required to consult with the First Nation regarding any provincial funding of the facility, because the funding agreements made it more likely that the mill would remain open and continue to release contaminants into the traditional territory of the First Nations group. The funding agreements also increased the likelihood of ministerial approval of the mill, in order to avoid wasting provincial funds. The court characterized the decision to enter into a funding agreement with Northern Pulp as a "strategic, higher level decision", to which the duty to consult extends per *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43.

Mi'kmaq of PEI v. Province of PEI et al, 2019 PECA 26
Province owed no duty to consult as Indigenous group provided little evidence about potential adverse impact

The P.E.I Court of Appeal handed down its first duty to consult decision, dismissing an appeal from the lower court's decision that the province conducted adequate consultation with the appellants before approving the transfer of Crown land to a private company.

In dismissing the appeal, the court noted that "[c]onsultation is a two-way street" and the First Nation provided little evidence or information to show how its asserted title claim would be eventually proven or its historic connection with the property: "The information provided was mainly repeated assertions with general statements of entitlement to title that did not materially contribute to an evidence-based assessment." Based on this evidence, the court characterized the First Nation's claim as "tenuous," meaning the scope of the duty to consult was at the low end of the spectrum. Measured against this benchmark, the province satisfied its duty to consult.

2. Injunctions

Coastal Gaslink Pipeline Ltd. v. Huson, 2019 BCSC 2264
Injunction granted as Court rejected the argument that Indigenous customary law recognized a right to conduct illegal blockade

The defendants, predominately members of the Wet'suwet'en Nation, erected a number of blockades to prevent road access required for the construction of a natural gas pipeline and export facility in British Columbia. The project proponent, Coastal Gaslink Pipelines Ltd., successfully applied for an interim and interlocutory injunction enjoining the blockades.

The defendants contended that they had a legal right to erect the blockades in accordance with Wet'suwet'en customary law. The B.C. Supreme Court dismissed this argument, finding that, as a general rule, Indigenous customary law must be recognized through some means or process to become an effectual part of Canadian law. Such processes include incorporation into treaties, court declarations or statutory provisions. Since Wet'suwet'en customary law had never been recognized in this manner, it was only admissible as fact evidence of the Indigenous legal perspective.

In concluding that the defendants' conduct was contrary to law, the court noted there was no evidence that Wet'suwet'en customary law recognized any right to blockades or obstructing others from pursuing lawfully authorized activities. The court also emphasized that the defendants had failed to take any steps to oppose the project through legal means.

3. Procedural issues

Squamish Nation v. British Columbia (Environment), 2019 BCCA 65
Intervenor status on judicial review of provincial approval of Trans Mountain denied to industry associations due to lack of direct legal interest

A group of industry and employee associations applied to intervene in the Squamish Nation's appeal of the Supreme Court of British Columbia's decision upholding the Environmental Assessment Certificate issued by the province for the Trans Mountain Pipeline expansion project.

The B.C. Court of Appeal dismissed the application, holding that the proposed intervenors had no direct interest in the appeal and would not be directly affected by the decision on appeal. While they had a potential economic interest in the project's completion, their legal rights and obligations would not be affected by the outcome of the appeal. Further, the court found the proposed intervenors did not have a distinctive perspective justifying granting intervenor status, and the issues they sought to advance would expand the scope of the appeal in a way that would be unfair to the appellant.

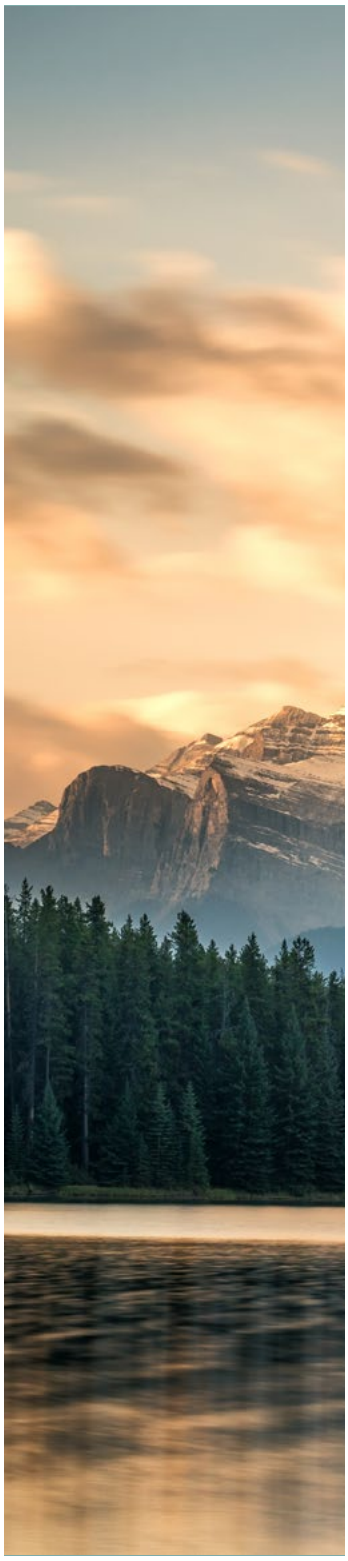
William v. Taseko Mines Limited, 2019 BCCA 479
On competing injunction applications, the imperative of reconciliation shifted the balance of convenience in favour of the First Nation

In addition to the above-noted petition for judicial review (2019 BCCA 74), the Tsilhqot'in Nation also brought an action seeking an order to quash the permit on the basis that it infringed their established and asserted Aboriginal rights (the infringement action). The infringement action was inactive pending the results of the petition.

While the judicial review petition was ongoing, injunctions were granted enjoining Taseko from carrying out the drilling program. When the Supreme Court of Canada denied leave to appeal the decision dismissing the judicial review application, the existing injunction expired and Taseko notified the Tsilhqot'in Nation of its intention to commence work on the drilling program. Members of the Tsilhqot'in Nation blocked Taseko from accessing the area where it proposed to commence work, resulting in Taseko bringing an action against the Tsilhqot'in Nation and the blockaders. The same day, the Tsilhqot'in filed a notice of intention to proceed with the Infringement Action and brought an injunction application in the infringement action.

The B.C. Supreme Court granted Tsilhqot'in's injunction application and held that Taseko's injunction application was therefore moot. While the B.C. Supreme Court found that both parties could suffer irreparable harm, it concluded the Tsilhqot'in would suffer greater irreparable harm and actions regarding rights infringement are an important part of reconciliation and thus of public importance.

Taseko applied for leave to appeal, which was dismissed by the B.C. Court of Appeal, which commented: "The reality of the situation faced by the judge was that the Infringement Action would be rendered essentially pointless unless she granted the interlocutory injunction sought by the Tsilhqot'in."



Gitxaala Nation v. Prince Rupert Port Authority, 2020 CanLII 382 (FC)
Test for joinder and intervener status under Federal judicial review

Two First Nations applied for an order that they be joined as party respondents, or in the alternative, named as interveners in an application for judicial review brought by Gitxaala Nation.

The underlying judicial review challenged the Prince Rupert Port Authority and Transport Canada decision that the construction and operation of a floating refuelling station would not cause significant adverse environmental effects per section 67 of the Canadian Environmental Assessment Act, 2012. The applicant First Nations supported the decision permitting construction and operation arguing they had a direct interest in the application as any delay would potentially prevent them from obtaining project benefits. The applicant First Nations also challenged Gitxaala's standing to bring the application on the basis that the project was located in an area over which the applicants asserted rights and title.

Gitxaala Nation opposed the application, arguing that the applicants were only seeking to be added as parties to litigate issues related to the strength of Gitxaala's asserted claim for Aboriginal title and rights.

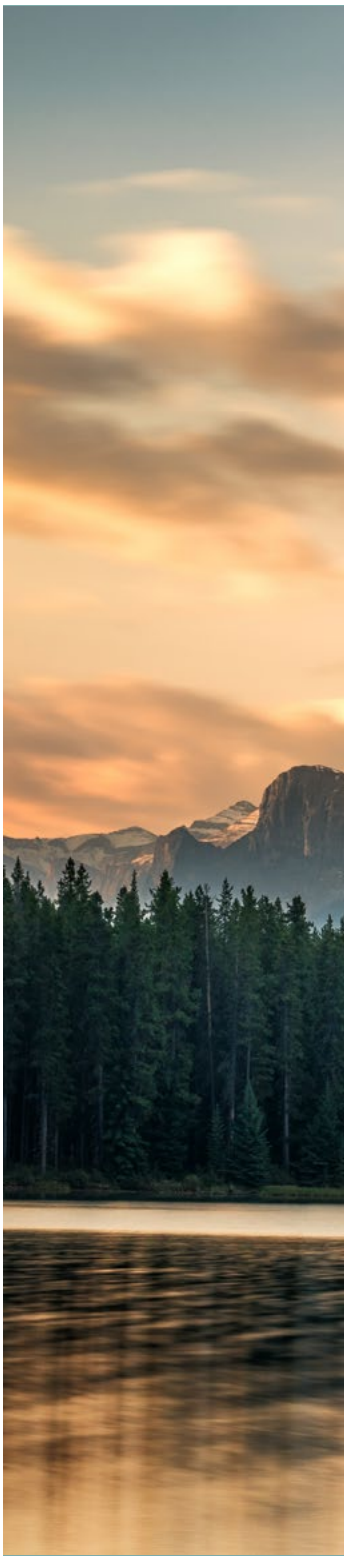
The Federal Court dismissed the application, holding that the applicants were not directly affected by the application as (1) their financial interest in the project was merely consequential or indirect, and (2) their challenge to Gitxaala's standing was not a basis to be added as parties to the litigation. Further, the court found that the applicants failed to demonstrate why their participation would be required to facilitate the court's analysis, and that the applicants improperly sought to adduce fresh evidence and raise new issues.

Wesley v. Alberta, 2019 ABQB 925
Court rejected addition of parties as defendants based on claims to overlapping territories

The Siksika Nation (Siksika) and Piikani Nation (Piikani) applied to be added as new defendants in an existing Aboriginal title and rights action by the Stoney Nakoda Nations (Stoney) against Canada and Alberta. Siksika and Piikani asserted title and rights to territories being claimed by Stoney. The applications were opposed by Stoney and Alberta.

The case management judge dismissed the Siksika and Piikani's applications. The governing rule in Alberta did not permit non-parties to apply to have themselves added as defendants. Only existing parties could make such applications.

In any event, the interests of justice would not be served by adding Siksika and Piikani as defendants. Adding Siksika and Piikani would add complexity and delay trial, the delay was neither reasonable nor justified, and a properly structured intervention application could address the interests of Siksika and Piikani in a manner that could dovetail with past and future procedural steps. The applications were dismissed, but Siksika and Piikani were invited to apply to intervene.



Anderson v. Alberta (Attorney General), 2020 ABCA 238
First Nation's application for advance costs granted set aside on appeal

Beaver Lake Cree Nation has advanced a claim against Alberta and Canada alleging that the cumulative effects of development have breached the terms of Treaty 6. The Court of Appeal of Alberta set aside the case management justice's decision to grant the Beaver Lake Cree Nation's (Beaver Lake), application for advance costs against Alberta and Canada.

The central issue on the appeal was whether Beaver Lake met the impecuniosity branch of the test for advance costs laid down by the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2.

Given the uncontested findings of fact made by the case management justice regarding Beaver Lake's financial resources, the court held that the First Nation did not meet the test for an advance costs award and the order was set aside.

4. Section 35, treaty and other issues

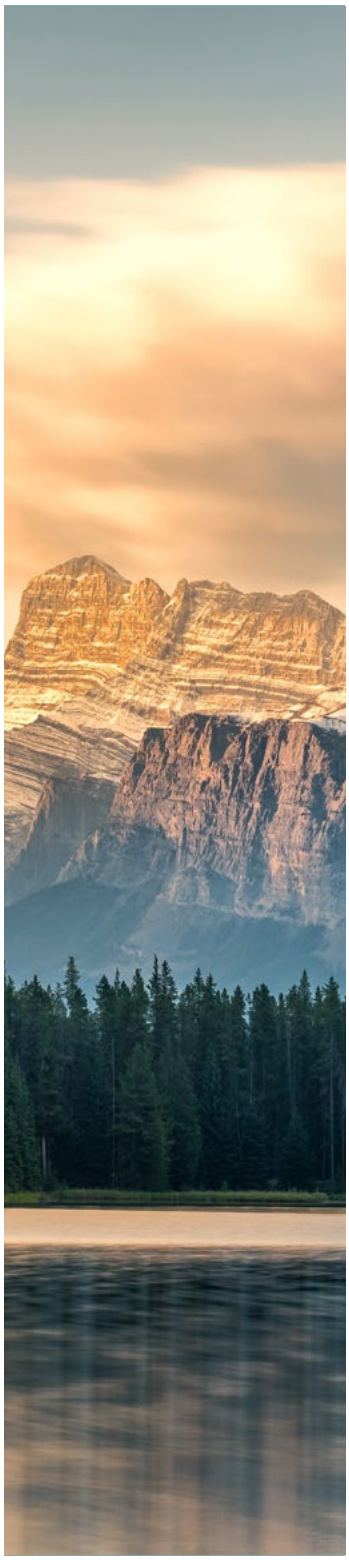
Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani Utenam), 2020 SCC 4
Quebec courts have jurisdiction to determine whether mining operations harmed an Indigenous people's traditional territory, even where part of the territory was located outside of Quebec.

In 2013, the Innu First Nation brought a claim against a mining company and a railway company, the latter being a corporation owned by the mining company, contending that their operations in Quebec and Newfoundland and Labrador had been commenced on their traditional territory without consent and infringed their Aboriginal rights under section 35 of the Constitution. The Innu sought a permanent injunction, damages and a declaration that they had Aboriginal title and rights over their traditional territory.

The companies brought a motion to strike the portions of the pleadings that involved Newfoundland and Labrador, which was supported by the Attorney General of Newfoundland and Labrador. The Quebec Superior Court and the Quebec Court of Appeal dismissed the motion to strike.

In upholding the lower courts' decisions, the majority of the Supreme Court of Canada found that the Quebec courts had jurisdiction to determine whether mining operations had infringed upon the Innu's traditional territory, despite part of the territory being outside Quebec. Aboriginal rights and title predate provincial borders and are not about property ownership, but about the relationship between the Crown and Indigenous groups. Since the rights claimed by the Innu existed before Crown sovereignty, the majority held that provincial borders should not affect these rights. To hold otherwise would impede access to justice by requiring the Innu to litigate the same issue in multiple courts, which would hinder the Innu's ability to pursue their rights and would go against the honour of the Crown.

In dissent, the minority of the Supreme Court held that the Innu's claim should be limited to those acts, activities or rights within Quebec's territory, since Aboriginal rights exist within the



Canadian legal system. Additionally, the dissenting judgment held that allowing the Quebec Superior Court jurisdiction to issue a declaration recognizing Aboriginal rights outside of Quebec would be detrimental to the principle of federalism.

R v. Desautel, 2019 BCCA 151
Section 35 Aboriginal rights apply to American Indigenous people who are not resident in Canada

The Crown appealed the acquittal of Mr. Desautel, an American citizen and a member of the Lakes Tribe in Washington State, who was charged with a hunting offence in British Columbia under the *Wildlife Act*. At trial, he successfully argued that he was exercising his lawful Aboriginal right to hunt for ceremonial purposes in the traditional territory of his Sinixt Ancestors, pursuant to section 35(1) of the *Constitution Act*, 1982.

The B.C. Court of Appeal dismissed the Crown's appeal and held that section 35(1) applies to Aboriginal peoples who are not residents or citizens of Canada – Aboriginal rights are rooted in pre-contact occupation of the land, not in being Canadian or in the *Constitution Act*, 1982. Therefore, the rights of non-resident members of the Sinixt collective who had pre-contact occupation of the land are equally protected by section 35(1).

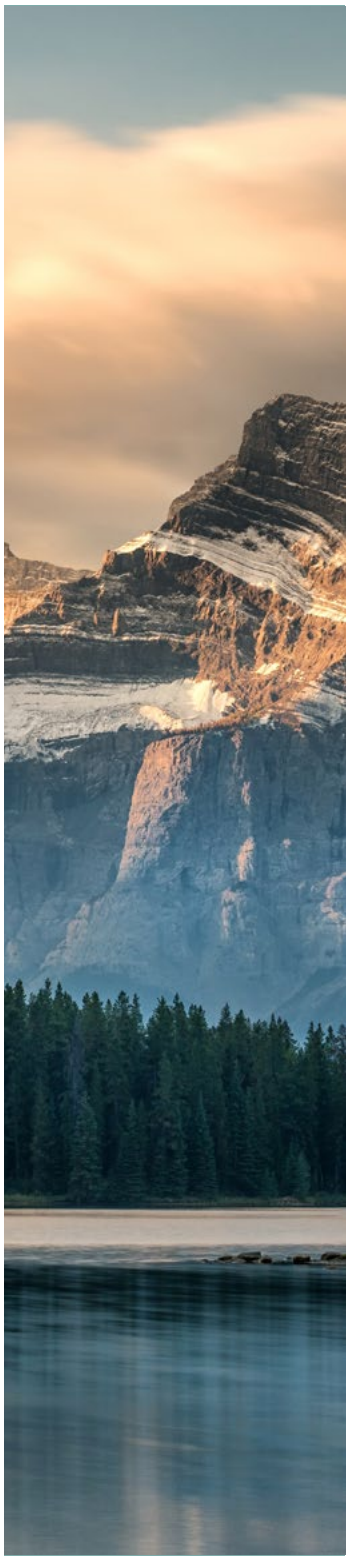
The court also held that section 35(1) does not require a present day community in the geographic area where the claimed right was exercised. The established connection to the historic community that hunted in the traditional territory is sufficient to meet the *Van der Peet* test. Modifying the test to add a geographic requirement would prevent displaced members of Indigenous communities from establishing their Aboriginal rights in areas their ancestors had occupied pre-contact, which does not support reconciliation.

Watson v. Canada, 2020 FC 129
Federal government's amalgamation of two separate treaty signatory bands was unlawful, but remedy limited to a declaration as other claims barred by limitations and prior settlement agreements

Two bands that had signed Treaty 4 in 1874 were combined into one band by the federal government 10 years later without consultation or agreement. Representatives of both historic bands brought separate actions against the Crown claiming that the amalgamation of the two bands was unlawful. The claims were eventually consolidated.

The Federal Court determined that, by amalgamating the bands without consultation or agreement, the Crown breached its fiduciary duties to the historic bands and failed to implement and fulfill its treaty obligations in accordance with the honour of the Crown. The court held that implicit and necessarily incidental to the treaty's promises was the continued existence of the band as an entity able to exercise its collective rights.

The court further found that one of the two bands had continued as a distinct rights-bearing collective with sufficient continuity with the historic band to assert continuing collective reaty rights. The court noted, however, that it did not have the authority to declare either band to be a band under the *Indian Act.*



The Federal Court limited the remedy to a declaration. The bands were estopped from seeking further treaty land entitlement from Canada because of prior settlement agreements. Additionally, limitation periods barred any compensation that would have flowed out of the loss of the reserves and unlawful amalgamation of the bands. Importantly, the court held that Canada's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples does not affect statutory limitation periods.

Manitoba Métis Federation Inc. v. Brian Pallister et al., 2020 MBQB 49
Manitoba Métis Federation Inc. not entitled to special procedural rights in relation to Cabinet policy decisions

The Manitoba Métis Federation Inc. (MMF) sought judicial review of the Lieutenant Governor in Council's (Cabinet) decision to issue an Order-in-Council authorizing the Minister of Crown Services to issue "A Directive to Manitoba Hydro Electric Board Respecting Agreements with Indigenous Groups and Communities" (the directive).

The directive purported to align Manitoba's policies with the Manitoba Hydro Electric Board's practices regarding all relationship and benefit agreements with Indigenous communities. It requires any such agreements (including existing agreements) obtain ministerial approval or provide mitigation or compensation measures to address defined impacts. As a consequence of the directive, ongoing negotiations and a relationship agreement (the agreement) between Manitoba Hydro and the MMF were terminated.

The MMF argued the directive was an unlawful and unreasonable exercise of the Cabinet's statutory authorization and that the directive failed to uphold the honour of the Crown. The MMF further argued that the honour of the Crown and/or the common law entitled the MMF to special procedural rights in relation to Cabinet policy decisions.

In dismissing the application, the Court of Queen's Bench of Manitoba found that the directive was a lawful exercise of the Cabinet's power to enforce its stewardship role over Manitoba Hydro, and that the decision to issue the directive was within the broad range of possible acceptable outcomes available to Cabinet based on policy considerations that fall within Cabinet's unique institutional role.

The court further held that the honour of the Crown was not engaged because the agreement was not a reconciliation and accommodation agreement, and because the directive does not affect or limit the Métis Aboriginal rights. The court commented: "The honour of the Crown is not engaged by all interactions or agreements between the Crown and Indigenous groups." The court further found that even if the honour of the Crown was engaged, Manitoba was attempting to act in the public interest and was not acting dishonourably against the MMF. Finally, the court dismissed the MMF's contention that it was entitled to special procedural rights in relation to Cabinet policy decisions.

Our Indigenous Law Practice

Norton Rose Fulbright offers an unparalleled network of legal professionals to successfully guide clients in the rapidly evolving legal field of Indigenous relations.

We represent clients across a wide range of industry sectors and regularly advise on land claim negotiations; project development on unceded traditional territories, reserve, and/or treaty lands; consultation best practices, negotiation and implementation of impact benefit and other agreements; regulatory issues, and environmental, social, governance and risk mitigation. Our litigation and dispute resolution team is at the forefront of precedent-setting cases, up to and including at the Supreme Court of Canada.

Aboriginal law, Nationwide
Chambers Canada, 2020

Indigenous law
Legal 500, 2020

Business & Human Rights
Chambers, Global 2020

Business & Human Rights, Nationwide
Chambers Canada 2020

Our areas of work include

- **Duty to consult and regulatory processes in project development:** The duty to consult and, where appropriate, accommodate Indigenous groups, has significant and far-reaching implications for our clients, including the risk of overturning previously approved projects. We routinely advise quasi-governmental agencies, regulators and project developers on the duty to consult, delegated aspects of consultation to project proponents, best practices and risk mitigation strategies.
- **Relationship building, impact and benefits agreements and participation agreements:** We regularly advise on, draft, and negotiate agreements between project proponents and financers and Indigenous groups. We also provide policies and procedures to our clients focused on ensuring effective engagement with Indigenous communities to build lasting partnerships.
- **Joint ventures and partnerships:** Indigenous businesses are thriving in many sectors of the economy, and many seek to establish relationships with experienced business partners in order to pursue specific opportunities. We provide advice on these business relationships, including the structuring of partnerships and joint ventures with Indigenous groups.
- **Land claims negotiations:** We deal with the unfinished business of treaty-making in Canada and the entering into of modern treaties between provinces, Canada and the Indigenous group. We advise clients with existing interests in lands that will be transferred to the First Nation (either in fee simple or as an addition to reserve lands) as a result of land claim negotiations.
- **Project financing and investment:** Inadequate consultation can result in court challenges delaying a project, as well as reputational harm, both to project proponents and their lenders. Alert to these risks, financial institutions are increasingly taking steps to establish expectations and standards reflecting best practices regarding engagement and mitigation, satisfaction of which is a condition to financing. We advise lending institutions on best practices and risk mitigation.
- **Litigation and dispute resolution:** Norton Rose Fulbright is counsel on several ongoing claims that will shape and define Aboriginal law in Canada and have successfully assisted clients in resolving judicial review applications of project approvals based on an alleged breach of the duty to consult. We have also been involved in a number of high-profile court cases that have either changed Canadian law or resulted in upholding prior established legal precedent.

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