2018 Duty to Consult Update: Selected Cases

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The Cases

- Saugeen First Nation v. Ontario (MNRF) (2017)
- Eabametoong First Nation v. Minister of Northern Development and Mines (2018)
- Mikisew Cree First Nation v. Canada (2018 - SCC)

Saugeen First Nation v. Ontario, 2017 ONSC 3456

- A developer wanted to extract aggregate (limestone) from a quarry
- The FN had a number of quarries in its traditional territory that it was monitoring – (over 500)
- The developer applied for a permit in 2008
- The FN did not have this particular quarry on its list that it was monitoring.
- Found out about the application for a permit through a zoning amendment notice in 2011
- FN immediately raised its concerns about not being consulted concerning the project. Crown alleged it gave notice in 2008 but little evidence to support.
- Crown tried to delegate procedural aspects of consultation – developer refused

Saugeen Cont’d

- The MNRF at one point offered funding to the FN so it could meaningfully participate in a consultation process. But they went back and forth on this.
- Then MNRF unilaterally terminated the consultations
- The FN sought judicial review
- The Court Found that the consultation process was deeply flawed and found that the crown failed to discharge its duty
- Found that even if the Crown assessed the extent of the consultation required in 2009 it did not disclose what the results of its assessment were to the FN

Saugeen Cont'd

- With respect to the issue of funding the court noted:

  [158] As noted above, SON is disinclined to spend its "community resources" to review someone else's project. That is a reasonable position.

  [159] SON has limited resources. It does not participate in consultations as a party to the Project. The expense of consultation arises as a result of a proponent's desire to pursue a project, usually for gain, and the Crown's desire to see the project move ahead. The Crown should not reasonably expect SON to absorb consultation costs from SON's general resources in these circumstances.

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

- Another case where the consultation process is flawed by the crown
- In 2011 Landore Resources advised that it wanted to get a permit so it could do advanced exploratory drilling in the traditional lands
- The First Nation was given notice and made its position known that it wanted meaningful consultation
- Crown delegated the procedural aspects of consultation – developer agreed
- The lands were very important to the FN
- Wanted an MOU with developer and developer provided a draft
- Wanted in person community consultation and the developer agree

Eabametoong Cont’d

- Consultation was stalled as a result of a community suicide crisis and change of leadership
- No one from the crown or developer complained of the stall and requested a meeting sooner. Consultation gets underway again in 2014
- Crown got involved in 2015 and begins to push the consultation process
- Another “in person” meeting was proposed for January 2016 but had to be delay until the CEO for developer was in the country.
- Then in January 2016 the crown and developer have a private meeting – developer discloses that it needs a permit as it is working on a deal with a big mining company.

Eabametoong Cont’d

- FN was never advised of the private face to face meeting or the fact that there was a deal with a big company in the works.
- After the private meeting no further meetings were sought with the FN
- In February 2016 the Crown advised that it would be making a decision on the permit soon and invited submissions from the FN
- The FN expresses concern of the change in approach to aborting the plan for face to face discussions, concerns with crown to proceed to decision making, concerns with Landore’s past exploration activities, and fact no response to FN of concerns it raised

Eabametoong

- Despite the FN’s concerns, on March 31, 2016 the Minister issues the permit
- Judicial review followed
- FN was successful due to the flawed process followed by the crown
- Did not uphold the honour of the crown

Eabametoong Cont’d

- [109] This summary of the events leading to the Permit makes it clear that from Eabametoong’s perspective it is reasonable for them to have felt that their expectations regarding the consultation process that they understood was going to take place was abruptly terminated. Essential to that process was a further community meeting and a MOU, the terms of which were to be discussed at the community meeting. Eabametoong’s expectations in this regard were reasonable ones – given everything that had occurred between them, Landore and the Ministry prior to February 11, 2016. Until that date, as far as Eabametoong knew, the next step in the process was going to be a meeting between Landore and the affected community that the Ministry was going to facilitate. It was unreasonable to find that consultation had occurred when the Ministry had so recently been working to arrange this meeting as part of fulfilling its consultation requirement.
- [110] I am prepared to accept that the Ministry, for appropriate reasons, has the right to change the course of a consultation process in spite of any expectations that may have been established in that regard by it or its delegate. However, if it does so, it must do so in a way that does not involve compromising the objectives of the duty to consult – namely, upholding the honour of the Crown by attempting to further the goal of effecting a reconciliation between the Crown and Indigenous peoples.
- [111] In this case, the Crown changed course without any explanation to Eabametoong. Further, it did so after a series of events that, once they became known, understandably gave rise to the view on Eabametoong’s part that the Ministry focus had switched from “talking together for mutual understanding”, to making sure that Landore had its permit in time to engage in discussions with Barrick Gold.

Mikisew Cree First Nation v. Canada, 2018 SCC 40

- New SCC case on duty to consult
- Still fresh off the press as it was released last week
- Court unanimously could have just dismissed the case as the *Federal Court Act* does not allow review of the parliaments activities
- Federal Court only has jurisdiction to review decisions of federal boards, commissions or other tribunals.
- S. 2(2) of the Act expressly excludes “the senate, the House of Commons, any committee or member of either House”.
- Only Justice Abella and Justice Martin (in summary) found the parliamentary process is a “crown” activity which required that the honour of the crown must be upheld and consultation afforded.

Mikisew Cree First Nation Cont'd

- All of the other judges found that this was not crown conduct that required consultation
- Terms such as parliamentary sovereignty, courts should not scrutinize law-making process, parliamentary privilege
- Legislative function vs. executive function
- Does not change the law concerning the duty to consult though
- Still have it in the *R. v. Sparrow* test – justifying infringement of rights test
- *Haida* and potential adverse effect test still apply to trigger consultation