Cassels

Court of Appeal Finds No Duty to Consult in Land Sale

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On November 13, 2019, the Prince Edward Island Court of Appeal considered whether the duty to consult arose and was satisfied when the Government of Prince Edward Island (Province) decided to sell the Mill River Resort (Mill River) as part of a larger ongoing initiative to divest of provincially-owned golf courses.[1]

In assessing the conduct of the Province, the Court of Appeal considered (a) whether the duty to consult arose and (b) whether the Province satisfied the duty to consult. The Court concluded that the duty to consult was not triggered[2] and that the Province's consultation efforts would have satisfied the duty to consult had it been triggered.[3]

In conducting its assessment, the Court asserted that its decision was based entirely on existing law and did not add or supplement jurisprudence.[4] The Court followed the well-worn approach set out by the Supreme Court of Canada when assessing the Province's consultation record. Consequently, the bulk of the Court's reasons addressing elements of the consultation ***process*** provide little jurisprudential value other than for the parties.

In contrast, the Court's approach to considering whether the duty to consult was ***triggered*** in the circumstances carries implications for rightsholders and governments across Canada. While the Court based its approach on the guidance of the Supreme Court of Canada, this decision marks one of the few examples of a court critically examining the ***triggering*** of the duty to consult and helps to enrich (rather than add or supplement) Canadian jurisprudence on the duty to consult.

Facts

The Mi'kmaq of P.E.I. have asserted Aboriginal title to all of the lands and waters of Prince Edward Island.[5] This claim is based on exclusive occupation at the time of first contact with Europeans and at the assertion of British sovereignty.[6]

Since Mill River was on Crown land, and the Mi'kmaq of PEI had given notice of its intention to bring a claim for Aboriginal title to all of Prince Edward Island, the Province initiated consultation in 2012 on its intention to dispose of Mill River.[7] Consultation continued until 2017.[8]

During the consultation period, "the Province provided the Mi'kmaq with timely and appropriate information regarding its general intention to divest its four golf course properties."[9] "The Province requested information and evidence in support of the Mi'kmaq claim to Aboriginal title and as to its concerns over

potentially adverse effects of the proposed conveyance."[10] In response, "the Mi'kmaq provided little by way of evidence or information to show how its asserted title claim would be eventually proven or as to its historic connection with the property. The information P.E.I Mi'kmaq did provide in response to the Province's requests was not of a kind that would provide significant support for its title claim, sufficiency of occupation of the Island generally, or any historic presence on the property at the date of British sovereignty."[11] "As a result, the sum total of information and evidence that was before the Province in support of the P.E.I. Mi'kmaq's claim to Aboriginal title was scant, and the Mi'kmaq claim as presented to the Province was tenuous."[12]

The Court also found that "there was no information or evidence provided to show potential or possible infringement/adverse impact on identified Mi'kmaq interest or association with the property as a result of conveyance of the property… There obviously would have been no present use or enjoyment, as the Mi'kmaq were not in present occupation of the property. But neither was there any information or evidence to show or raise the prospect of any past presence or interest to be preserved."[13] "There was no evidence that would tend to show potential for irreparable harm or harm that could not be compensated by an award of damages should the P.E.I. Mi'kmaq eventually prove their claim to all or some part of Prince Edward Island including the property."[14]

In concluding on the conduct of the duty to consult, the Court stated that "the consultation that occurred was as complete as it could be in the circumstances, and that it was sufficient. In my opinion, the Province acted reasonably in performing its duty, and its decision that it fulfilled its duty was reasonable."[15]

In concluding on whether the duty to consult was triggered, the Court stated that "the Province's duty to consult was not triggered because there was no information or evidence of: (i) any historic interest, or (ii) any present-day interest, of the P.E.I. Mi'kmaq in the Mill River property that could potentially be adversely affected by the proposed change of ownership and control."[16]

Triggering the Duty to Consult

In determining that the duty to consult was not triggered, the Court provided guidance on (a) the unique assessment required in relation to each decision; (b) the requirement that there exists a potential adverse impact to Aboriginal rights in respect of the decision at hand; and (c) the substantive basis required for determining that there is a material risk.

The Need for a Unique Assessment

The Appellants had asserted, as summarized by the Court, that because the Mi'kmaq of PEI assert a claim to all of Prince Edward Island, any contemplated transfer of Crown land would trigger the Province's duty to consult.[17] The Court disagreed, stating that the factual matrix in each situation needed to be considered separately to determine whether the duty to consult arose.[18]

In assessing the particular "factual matrix," the Crown decision-maker must consider the information before it regarding (a) potentially adverse effects of the government action, and (b) the impact of that action on the protected Aboriginal interests.[19]

The Potential for an Adverse Effect on an Aboriginal Interests

In the case of the Province's decision to sell Mill River, the duty to consult could only arise if there is an Aboriginal interest which was at risk specifically in relation to those lands and the Crown decision at issue. That assessment included understanding whether there were historic or present-day interests in the land which could potentially be adversely affected.[20]

The Court noted in its decision that the Mi'kmaq did not demonstrate any real and appreciable historic attachment or present-day interest or use of the Mill River property that might be destroyed or denied by the contemplated Crown action.[21]

A Substantive Basis for the Potential Adverse Effect

To trigger the duty to consult, there must be a substantive basis supporting the potential for an adverse effect to an Aboriginal interest.

In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*[22], the Supreme Court of Canada stated that the adverse effect necessary to trigger the duty to consult must be real, appreciable, and non-speculative.[23] The Court applied the guidance in Rio Tinto to state that "the potential infringement or adverse effect has to be ***material*** [*emphasis added*]."[24] The Court was clear throughout its decision that the threshold for the duty to consult was "low," however, as construed by the Court, even a "low" threshold requires a material and substantive basis for concern. "While the threshold is low, it needs to be satisfied by ***showing*** a potential that the contemplated conduct may adversely affect an Aboriginal claim or right [emphasis added]."[25]

The Court was clear that "[n]ot every government contemplated action triggers the duty; a potential to adversely affect the asserted Aboriginal title needs to be shown. The threshold for the trigger is low, ***but there is a threshold to achieve***." [*emphasis added*][26]

The Court found that the concerns of the Mi'kmaq – that a conveyance of the Crown land could result in a change of use that resulted in an adverse effect to the asserted interests – were speculative given that "no specter was raised of another use that might desecrate or denude the property [and] any such use would be entirely speculative."[27] (These claims were also challenged by the lack of a demonstrated historic interest or attachment to the property that would be the object of this protection.[28])

Wider Applicability

While the Prince Edward Island Court of Appeal has asserted that they have not supplemented or added jurisprudence in their assessment of the duty to consult in respect of the sale of Mill River, they have enriched the jurisprudence regarding the triggering of the duty to consult.

In many instances, it is prudent for governments and proponents to engage in consultation, even if it is not clear that the duty to consult has been triggered. The cost of engaging in a consultation process is often significantly less than having to engage after-the-fact or having a project or decision blocked after it is underway. While the Province did not need to consult, it reduced its risk by conducting a process that both the Court of Appeal and the Supreme Court of Prince Edward Island have concluded was sufficient to satisfy any duty to consult that could have arisen in the circumstances.

In some cases, however, unnecessary consultation can result in unnecessary costs and delays with minimal benefits. Governments in particular should critically consider lower-impact and routine decisions to assess whether the duty to consult is being triggered. Excessive consultation on decisions that have little or no material impact on Aboriginal rights takes time and resources from all parties and may distract from the more substantive conversations needed across Canada to advance reconciliation.

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[1] *Mi'kmaq of PEI v Province of PEI et al*, 2019 PECA 26 at para 2 [*Mill River*].
[2] *Ibid* at para 9.
[3] *Ibid* at para 11.
[4] *Ibid* at para 34.
[5] *Ibid* at para 1.
[6] *Ibid*.
[7] *Ibid* at para 3.
[8] *Ibid*.
[9] *Ibid* at para 12.
[10] *Ibid*.
[11] *Ibid* at para 13.
[12] *Ibid*.
[13] *Ibid* at para 14.
[14] *Ibid* at para 16
[15] *Ibid* at para 67.
[16] *Ibid* at para 120.
[17] *Ibid* at para 119.
[18] *Ibid*.
[19] *Ibid*.
[20] *Ibid* at para 120.
[21] *Ibid*.
[22] 2010 SCC 43 [*Rio Tinto*].
[23] *Ibid* at paras 40-46.
[24] *Mill River*, supra note 1 at para 98.
[25] *Ibid* at para 118.
[26] *Ibid* at para 113.

[27] *Ibid* at para 101.
[28] *Ibid*.
