Cassels

# Duty to Consult Requires a Potentially Material Adverse Effect

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**April 23, 2020**

On April 23, 2020, the Supreme Court of Canada dismissed, with costs, an application for leave to appeal the PEI Court of Appeal's decision in *Mi'kmaq of P.E.I. v. Province of P.E.I. et. al*. (*Mill River*)[1]. *Mill River*, released in November 2019, offered a fresh and helpful perspective on the Crown's duty to consult.

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The original judicial review was brought by the Mi'kmaq of PEI (Mi'kmaq) when the Province sold the Mill River golf course, following a consultation process that started in 2012. The Mi'kmaq, who claim Aboriginal title to all of Prince Edward Island, argued that the Crown had not satisfied its duty to consult.

The Court of Appeal concluded that the Crown's duty to consult never arose in the circumstances of the sale, and that the Province's consultation efforts, in any event, were sufficient to discharge any duty to consult that arose.

## Impact Must Be "Material"

In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* (*Rio Tinto*)[2], the SCC had noted that the duty to consult was not triggered by every Crown decision or action. Instead, there must be a real, appreciable, and non-speculative impact on the rightsholders' ability to exercise their Aboriginal right.[3]

The Province argued before the Court of Appeal that "appreciable," as described in Rio Tinto, is an important threshold that functions as a materiality test. This argument was adopted by the Court of Appeal, which concluded that the "*potential infringement or adverse effect has to be material; to have qualities of being appreciable, real, and non-speculative*."[4]

In concluding that this materiality test had not been met, the Court of Appeal noted that "*the Mi'kmaq did not demonstrate any non-speculative, 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*."[5]

## Need for Substantive Impact

The Mi'kmaq had claimed that any alienation of Crown land would result in an adverse effect capable of triggering the Crown's duty to consult since they asserted Aboriginal title to the entirety of Prince Edward Island.[6] In response, the Province argued that there must be something culturally significant or unique about the lands themselves that risked being lost because of the alienation.

The Court of Appeal concluded that not every transfer of Crown land will trigger the Crown's duty to consult. Whether the Crown's duty to consult is triggered is dependent on the unique context, based on (i) any historic interest or (ii) any present-day interest that could potentially be adversely affected by the change of interest or control.[7]

In this case, the preliminary strength of claim was assessed as 'weak.' The Mi'kmaq showed only minimal connection to the property; showed no connection of interest in the property probative of Aboriginal title; showed no identifiable interest in the property that could be affected by the transfer; showed no historic association or present-day association with the property; and did not show any uniqueness, significance, or special characteristics in the property.[8]

## Broad Implications

The Court of Appeal followed the guidance of the SCC in reaching its decision. As the Court noted, "there is no gap in the law calling for any new or supplementary jurisprudence."[9] But in reaching its decision, the Court of Appeal highlighted and applied the principles set out in *Rio Tinto*. The duty to consult is not triggered in every circumstance. While the threshold for triggering the Crown's duty to consult is low, there is a meaningful threshold. There must be a ***material substantive adverse effect*** in order to trigger the Crown's duty to consult.

The Court of Appeal's guidance is helpful for all parties working towards reconciliation. Significant resources and energy are expended across Canada consulting on Crown decisions and activities with no potential appreciable adverse effects. These consultation efforts put a burden on Crown, Indigenous, and industry resources and time, while doing little to protect asserted Aboriginal rights before they can be established through treaties or the courts.

## Acknowledgement

Thomas Isaac and Arend Hoekstra were counsel of record for the Province of Prince Edward Island, along with Lynn Murray, QC of Key Murray Law (Charlottetown). The Province was also assisted by Michael Osborne of Cassels and Ryan MacDonald of Key Murray Law.

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[1] 2019 PECA 26 [*Mill River*].
[2] 2010 SCC 43 [*Rio Tinto*].
[3] *Ibid* at para 46.
[4] *Mill River*, *supra* note 1 at para 98.
[5] *Ibid* at para 120.
[6] *Ibid* at para 119.
[7] *Ibid* at paras 119-120.
[8] *Ibid* at para 103.
[9] *Ibid* at para 34.

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