Cassels

Duty to Consult Requires Identifiable, Appreciable Adverse Effect: YT Court of Appeal

Arend J.A. Hoekstra, Thomas Isaac

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On April 30, 2020, the Yukon Court of Appeal dismissed an appeal by the Ross River Dena Council (RRDC)[1] (commentary on the underlying Supreme Court of Yukon decision can be found here). In its decision, the Court of Appeal confirmed that until Aboriginal title is negotiated in a treaty or established in court, simply asserting Aboriginal title does not grant any of the particular rights associated with Aboriginal title. The Court also complemented a recent decision by the PEI Court of Appeal (commentary can be found here) by noting that consultation is only required where a Crown action or decision may result in an **identifiable and appreciable** potential adverse effect on the asserted right.

This decision of the Yukon Court of Appeal is relevant for governments seeking to discharge their duty to consult, particularly in the context of Aboriginal title.

Facts

RRDC sought a declaration that Yukon had a duty to consult and, where appropriate, accommodate RRDC before issuing hunting permits over the lands to which they assert Aboriginal title.[2] The concerns of RRDC were not over wildlife matters, but over their asserted right to "the exclusive use and occupation of the Ross River Area."[3] RRDC argued "that Yukon's action of issuing hunting licences and seals has a potential adverse effect on the claimed right because it interferes with the incidents of title by permitting people other than RRDC's members to use and occupy the lands."[4]

Core to RRDC's argument was whether the attributes of Aboriginal title, as previously articulated by the Supreme Court of Canada (exclusive use and occupation of the land), were subjects for consultation where there was an asserted but unproven claim for Aboriginal title.[5]

Asserting Aboriginal Title Does Not Create Rights

As noted by the Court, RRDC had not established Aboriginal title to the Ross River Area; the process was still in the early stages.[6] Without establishing Aboriginal title, the Court concluded that RRDC did not have an exclusive right to control the use and occupation of the land, nor did it have a right to veto government action.[7]

The Court's approach appears to treat Aboriginal title consistently with the treatment of other rights such as fishing and hunting. While Aboriginal rights are generally permissive, until established through courts or treaties, they do not provide exclusive access to, or control of, a resource. As the Supreme Court of Canada said in *Haida Nation v. British Columbia (Minister of Forests)*, "The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution."[8]

Need for Appreciable, Identifiable Effect

The Court of Appeal also considered the requirements for triggering the Crown's duty to consult found in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*,[9] which are: (a) an asserted Aboriginal or treaty right; (b) a Crown decision or action; and (c) the potential for an appreciable, non-speculative adverse effect of the Crown decision or action on the asserted Aboriginal or treaty right.

While RRDC expressed a concern that licenced individuals would enter into the Ross River Area, the Court found that RRDC "did not identify how this would have an '**appreciable** adverse effect' on RRDC's ability to control the use and occupation of the land in the future, or would otherwise adversely affect its rights or interests [*emphasis added*]"[10] other than the potential impacts to wildlife which Yukon had consulted on. It was not enough to claim that a Crown action would mean people would enter a claimed territory, "the duty to consult rested on **identifiable** adverse effects to the **subject matter of the claim** [*emphasis added*]."[11]

Consistent Theme

The Court of Appeal's decision was brief, with its analysis conducted over 11 paragraphs. But the reasons and approach are consistent with the PEI Court of Appeal's recent decision in *Mi'kmaq of PEI v Province of PEI et al.*, where that Court noted that to trigger the Crown's duty to consult, "the potential infringement or adverse effect has to be **material**; to have qualities of being **appreciable, real, and non-speculative** [*emphasis added*]."[12]

Both decisions also considered the unique aspects of the Crown's duty to consult as it relates to Aboriginal title, with the decision in *Ross River* emphasizing that asserting Aboriginal title does not grant rights associated with Aboriginal title, while the Court in *Mill River* highlighted that the duty to consult will be different in each case, and that alienation of Crown land subject to assertions of Aboriginal title will not necessarily trigger the Crown's duty to consult.

Focus on Reconciliation

Reconciliation requires a balancing of the broader interests of Canadian society with the rights-based

concerns of Canada's Indigenous peoples. This balancing is informed through consultation and, where appropriate, accommodation. But the consultation process itself should not become a burden or distraction to reconciliation. Consultation efforts of all parties should be focused on matters which pose an **identifiable and appreciable** risk to unproven Aboriginal rights. Straining capacity, resources, and timelines on immaterial matters distracts from reconciliation and is potentially a hinderance to reconciliation.

Likewise, until Aboriginal title is proven, the Crown must be able to manage its resources to the benefit of Canadians and in a manner that is sensitive to the rights-based concerns of potentially impacted Indigenous peoples. The level of Crown sensitivity required will fluctuate with the strength of the asserted claim; however, the core tenets of Aboriginal title (exclusive use and occupation) will only manifest once title is established through treaty or the courts.

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[1] *Ross River Dena Council v Yukon*, 2020 YKCA 10 [*Ross River*].
[2] *Ibid* at para 13.
[3] *Ibid* at para 14.
[4] *Ibid* at para 14.
[5] *Ibid* at para 16.
[6] *Ibid* at para 22
[7] *Ibid* at para 22.
[8] 2004 SCC 73 at para 27.
[9] 2010 SCC 43.
[10] *Ross River*, *supra* note 1 at para 24.
[11] *Ibid* at para 25.
[12] 2019 PECA 26 at para 98 [*Mill River*].