

Regulatory Affairs – Haida at 20

Jeremy Barretto, Mackenzie Hayden

April 11, 2024

Regulatory Affairs – a quarterly round-up of recent items of interest along with new and timely updates – is brought to you by our Regulatory Group and is edited by Jeremy Barretto and Mac Hayden.

In this edition: It has been 20 years since the Supreme Court of Canada (SCC) released its seminal decision on the Crown's duty to consult and accommodate Aboriginal interests. This edition of Regulatory Affairs looks at the key developments in Aboriginal law and Crown consultation since *Haida* and explores the new reality of Crown decision making and project regulatory pathways in Canada today. *Haida* changed the landscape for regulatory project approvals by requiring significantly more engagement with respect to potential impacts of project development on Aboriginal rights and interests. We also profile recent news from the Cassels Aboriginal Law and Regulatory Groups in this edition.

Hot Off the Press

Twenty Years Since *Haida*: The State of Crown Consultation Today >

Two decades ago this year, the Supreme Court of Canada (SCC) released its landmark decision in *Haida Nation v. British Columbia (Minister of Forests)*. Since *Haida*, the law surrounding the Crown's duty to consult has evolved considerably, changing the landscape for project development and Crown decision making in Canada.

Cassels in the News

Cassels Lawyers Recognized Among the Best in the Country by *Best Lawyers* 2024 >

80+ Cassels lawyers across 30 practice areas, including members of our Aboriginal Law and Regulatory teams, have been named to the 2024 edition of *Best Lawyers in Canada*.

Cassels Lawyers Ranked Among Canada's Best by *Lexpert's* 2024 Directory >

75+ Cassels lawyers, including members of our Aboriginal Law and Regulatory teams, have been recognized as leaders in their field in the 2024 edition of the *Canadian Legal Lexpert Directory*.

In Case You Missed It

BCSC Acknowledges Crown Duty to Consult in Granting of Mineral Tenures – Opens Door to Greater Uncertainty >

The BCSC found that the claim registration process, which granted the claimant a mineral claim as well as certain rights to remove minerals and disturb lands within the claim area, triggered the Crown's duty to consult. In reaching its conclusion, the Court introduced two new concepts that could have broad implications for government decision-makers and the natural resource industry.

BC Court of Appeal Upholds the Defence of Statutory Authorization for Impacts to Aboriginal Rights by Third Parties >

In upholding large sections of a lower court judgment, the BCCA held that an Aboriginal right protected under section 35 of the *Constitution Act, 1982* can ground a common law private claim in nuisance in appropriate circumstance but a nuisance claim arising from interference with an Aboriginal right is subject to the defence of statutory authority. Read our legal update to learn more about remedies for infringement and how statutory authorizations may be affected by this decision.

A Great Unknown: Government of British Columbia Creates Considerable Uncertainty with Recognition of Aboriginal Title to Private Land >

The Government of British Columbia has announced an agreement which will recognize Haida Nation's Aboriginal title over all lands on Haida Gwaii – including privately owned lands. It is unclear whether the province has contemplated the impact that recognizing Aboriginal title in this manner will have on private property interests and existing interests in Crown land. It appears the province has fashioned a version of Aboriginal title which is unknown at law, creates considerable uncertainty, and does not promote the reconciliation of Aboriginal and non-Aboriginal interests inherent in section 35 of the *Constitution Act, 1982*.

Court Orders Province to Pay \$10.125 Million For Blocking Project Opposed by First Nations >

A British Columbia court ordered that the BC government pay a developer \$10.125 million as compensation

Cassels

for unlawfully deciding not to issue permits for a hydro-electric project that had been opposed by the Squamish Nation. The case appears to be the first case of a proponent successfully establishing the tort of “misfeasance in public office” for a project that was rejected due to Indigenous opposition.

Finding a Role for Government in Indigenous Benefit Agreement Negotiations for Mining Projects >

Over the past few decades, agreements between Indigenous peoples and proponents which provide for project certainty and shared benefits have become standard practice in Canada. Governments are now increasingly seeking to promote or even mandate Impact Benefit Agreements, which historically were negotiated on a voluntary basis by Indigenous parties and proponents seeking to reduce regulatory and project uncertainty and share in benefits.

What Now? The SCC Finds Federal Impact Assessment Act Largely Unconstitutional >

Jurisdiction over the environment is shared between the federal and provincial governments under the Canadian constitution. In recent decades, the federal government has attempted to promote environmental protection, while expanding its overview of environmental assessments in a manner it believed was consistent with the constitutional division of powers. The decision of the majority confirms that the federal government’s new impact assessment regime is largely unconstitutional and goes beyond Parliament’s constitutional authority.

Team News

Cassels’ Aboriginal Law Group Congratulates Emilie Cox on Admission to Partnership

Cassels is pleased to announce that Emilie Cox has been admitted into the Cassels Brock & Blackwell LLP partnership.

Emilie maintains a broad Aboriginal law practice, providing advice to clients in the resource sector across Canada on matters relating to Aboriginal rights, the duty to consult, Indigenous-Crown relations, and project-related environmental and regulatory matters. Emilie also advises clients on issues pertaining to Indigenous self-governance, constitutional, and administrative law.

Emilie has extensive advocacy experience, including appellate litigation, commercial and international arbitration, and constitutional litigation. She regularly appears before the Federal Court of Canada on matters under judicial review pertaining to Aboriginal and environmental law. Emilie has devoted significant hours to pro bono work, including working to further LGBTQ+ rights in Alberta. She sits on the Board for the

Cassels

Elizabeth Fry Society of Calgary and the Elektra Choir in Vancouver.

Stay Tuned!

The Cassels Aboriginal and Regulatory Law Groups are excited to announce the upcoming publication of two texts which will provide important insights and commentary on changing areas of law. We will also be hosting a webinar in May.

Aboriginal Law, 6th Edition by Thomas Isaac

Aboriginal law has evolved substantially since the release of the 5th edition of this authoritative text. Cassels is thrilled to announce the upcoming publication of the 6th edition of this important resource with key updates regarding, among other things:

- Aboriginal rights and title, self-government, and UNDRIP;
- The Crown's duty to consult;
- Federal, provincial, and territorial authority;
- Métis rights

The Law of Indigenous-Owned Projects by Jeremy Barretto and Thomas Isaac

The law of Indigenous-owned projects is multidisciplinary and includes Aboriginal law, land, corporate, tax, regulatory and other legal considerations. This comprehensive resource considers fresh perspectives on how legal matters are typically addressed. This resource will assist practitioners who advise Indigenous communities, governments, and industry on the further development of Indigenous-owned projects and will provide a thorough overview of the key legal issues, which can accelerate and support the development of these projects in the decades to come.

Stay tuned for more information regarding the release dates for these important texts.

Webinar - Aboriginal Law: Case Law Update 2024

Join us on Tuesday, May 14, 2024, as experts from our Regulatory and Aboriginal Law Groups provide an overview of recent trends along with pragmatic and contextualized insights on a variety of critical topics, including:

- *Haida Title Agreement*
- *Thomas v. Rio Tinto Alcan Inc.*, 2024 BCCA 62
- *Reference re An Act respecting First Nations, Inuit and Métis children, youth, and families*, 2024 SCC 5

Cassels

- *Reference re Impact Assessment Act*, 2023 SCC 23
- *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680
- *Wolastoqey Nation v. New Brunswick et al.* 2024 NBKB 21

As a national leader in Aboriginal and regulatory law, Cassels offers decades of experience advising clients across Canada on a full spectrum of Aboriginal and regulatory law matters and is uniquely positioned to provide the comprehensive yet nuanced update that participants require in 2024.

This event will include Cassels speakers Thomas Isaac, Sandra Gogal, Jeremy Barretto, Arend Hoekstra, Emilie Lahaie, Jared Enns, Emilie Cox, Aaron Cressman, Dana Poscente, Mac Hayden, and David How.

CPD Accredited. Stay tuned for details.

The Cassels Regulatory Group brings expertise in connection with a variety of regulated industries in Canada. Cassels' Regulatory Group advises and advocates for clients in the in these industries acting as a trusted advisor to ensure timely project approvals.

The Cassels Aboriginal Law Group brings extensive expertise and a multi-disciplinary approach to their work with industry, government, and Aboriginal peoples (including First Nations, Métis, Inuit and Innu) in connection with business transactions and public policy decisions affected by Aboriginal issues and Aboriginal law. Cassels lawyers have experience advising clients in every jurisdiction in Canada on consultation matters, including negotiating and drafting memoranda of understanding, consultation agreements, access agreements, impact/benefit agreements, participation agreements, treaty land entitlement agreements, exploration agreements and other documentation related to activities involving Aboriginal peoples and all litigation matters involving Aboriginal rights and title.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.