Cassels

Asserting Aboriginal Title Does Not Alter Crown's Duty to Consult

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June 11, 2019

On May 27, 2019, the Supreme Court of Yukon considered, in *Ross River Dena Council v Yukon*,[1] whether the Crown's obligations pursuant to the duty to consult change when Aboriginal title is asserted. In concluding that assertions of Aboriginal title ***do not alter*** the content of the Crown's duty to consult, the Court provided practical guidance on the content of 'deep consultation,' and suggested that there are circumstances, such as the issuing of individual hunting licences, where it is neither practical nor appropriate for the Crown to consult.

The Ross River Dena brought an "application for a declaration that Yukon failed to consult, and where indicated, to accommodate" Ross River Dena when it issued hunting licences in areas subject to claims for Aboriginal title.[2] In particular, the Ross River Dena claimed that Yukon: (a) refused to accept that their claimed Aboriginal title to the Ross River area included the right to exclusive use and occupation of, and management and control over, that area; and (b) continued to deny that issuing hunting licences and seals might adversely affect their claimed Aboriginal title to the Ross River area.[3]

Depth of Consultation Required – Unique Constitutional Obligations Applied

In evaluating the Crown's duty to consult, the Court first considered the strength of the asserted claim and noted several factors which suggested a higher strength of claim, including:

a. The constitutional obligations under the Rupert's Land and North-Western Territory Order of 1870, which required that claims in the area be settled in advance of the lands being opened up for settlement;[4]
b. The existence of "off and on" land claim negotiations from 1973 to 2002;[5] and
c. The set aside of lands, on an interim basis, for settlement purposes.[6]

In addition to "the longstanding constitutional recognition of the [Ross River Dena] claim"[7], the Court noted that Yukon and the Ross River Dena had entered into a comprehensive Framework Agreement lasting between January 2016 and March 2017 (during which time the case was brought) which prioritized negotiations relating to fish and wildlife matters, including with regard to ongoing litigation between the parties.[8] The Court concluded that as a consequence of the strength of claim and ongoing negotiations, Yukon had an "obligation to have ***deep*** consultation with the [Ross River Dena] on wildlife matters [*emphasis added*]."[9]

Asserted Aboriginal Title and the Crown's Duty to Consult

The Court noted that the fundamental issue was "whether the ownership rights of established Aboriginal title can be applied to the duty to consult in an asserted claim for Aboriginal title."[10] In *Tslihqot'in Nation*,[11] the Supreme Court of Canada described the principles of Aboriginal title:

Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.[12]

The Ross River Dena asserted that the Aboriginal title principles espoused in *Tsilhqot'in Nation* should apply to the duty to consult as a consequence of an asserted claim for title.[13]

The Court noted that Ross River Dena were at the claim stage of asserting Aboriginal title, and had ***not yet established*** Aboriginal title.[14] As a consequence, while the duty to consult in these circumstances required "deep consultation and accommodation, if appropriate"[15], the Ross River Dena did "not have a right to veto any development or impose a duty to agree or require [Ross River Dena] consents to any development in the Ross River Area."[16] In short, the principles of Aboriginal title, as described in *Tsilhqot'in Nation*, did not apply to the duty to consult.[17]

Evidence of Deep Consultation

The Court found that Yukon "consulted extensively with Ross River Dena".[18] This consultation included providing notification of planned wildlife initiatives;[19] sharing specific wildlife data and information;[20] and providing funding to participate in discussions and negotiations with Yukon, and to participate in game check and land steward programs.[21] There was "a lot of correspondence as well as many meetings and discussions between the representatives," which included many specific proposals put forward by Ross River Dena.[22]

In response to these communications and a population decline of the Finlayson Caribou Herd, Yukon closed the permit hunt ***for that species specifically*** for the 2019/2020 hunting season;[23] however, Yukon did not consider there to be a depletion of wildlife resources generally in the Ross River Area (an assertion of the Ross River Dena), or that a broader hunting moratorium proposed by the Ross River Dena was necessary.[24]

Conclusions of the Court

The Court concluded that the consultation process conducted by Yukon amounted to "deep consultation", and that there had "been no breach of the duty to consult, and where appropriate, to accommodate."[25]

The Court also concluded that there was no "requirement for Yukon to consult with respect to the incidents of Aboriginal title set out at para. 73 in *Tsilhqot'in Nation* ***on the basis of an established Aboriginal title*** [emphasis added]."[26]

In its conclusion, the Court also noted that there was no obligation for Yukon to consult prior to the issuance of each hunting licence and seal, as it would not be "practical nor appropriate to make every holder of a licence and seal in Yukon subject to a duty to consult Ross River Dena prior to issuance."[27]

Implications

While the facts at issue are unique, *Ross River Dena* provides practical guidance for understanding the Crown's duty to consult.

First, the Court reaffirmed that the assertion of Aboriginal title does not fundamentally change the Crown's duty to consult. The principles of Aboriginal title in *Tslihqot'in Nation* apply only where Aboriginal title has been established.[28]

Second, even where the duty to consult is deepest (in this case, as a result of unique constitutional obligations supporting claims to Aboriginal title), the duty to consult remains ***focused on a process*** rather than an outcome. The rights holder does not have a veto, and there is no duty to agree or require the consent of the Indigenous party.[29] Even in circumstances requiring ***deep consultation***, accommodation is ***not guaranteed***, but instead is required "if appropriate."[30]

Third, the Court suggested that there are occasions where, in consideration of practical factors, the Crown's duty to consult should not arise. While the Court referred specifically to the granting of hunting licences and seals,[31] there are other analogous circumstances where it may "not [be] practical nor appropriate" to subject every application or authorization to the duty to consult.[32] One potential example would be the issuing of mineral claims or prospecting authorizations. In these types of circumstances, it may be justifiable for the Crown to consult in relation to the overarching structure, and in doing so, communicate its intention to not consult on individual decisions. Given the Supreme Court of Canada's decision in *Mikisew*,[33] which suggested that there is no duty to consult with regard to legislation, it is unclear whether a legislative decision could empower a regime in which the transactional decisions also avoid the duty to consult, thereby creating a process with no opportunity for consultation.

Fourth, while the decision in *Ross River Dena v Yukon* addressed issues of Aboriginal title, the decision ***fundamentally*** related to the protection of wildlife. Even without a claim for Aboriginal title, the duty to consult would have continued to arise in relation to other asserted Aboriginal rights. As a consequence, it is difficult to identify what, if any, additional duty was owed on account of the assertion of Aboriginal title. The case for potentially adverse impacts in these circumstances (including to both asserted harvesting rights and title rights) was fundamentally more robust than that seen in the 2017 decision of *Mill River*[34], for

example, which addressed lands subject to claims of Aboriginal title alone, without associated impacts to other Aboriginal rights. Our summary of the *Mill River* decision can be found here.

The Cassels Aboriginal Law team has extensive experience with regulatory processes, the duty to consult, project and resource development, negotiations, and advocacy, including in relation to assertions of Aboriginal title. We work on matters across all of Canada's provinces and territories. Our core team includes: Thomas Isaac, Jeremy Barretto, Arend Hoekstra, Emilie Lahaie, and Jared Enns. Please feel free to contact any member of our team to discuss any matter related to Aboriginal Law.

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[1] *Ross River Dena Council v Yukon*, 2019 YKSC 26 [*Ross River Dena*].
[2] *Ibid* at para 14.
[3] *Ibid* at para 15.
[4] *Ibid* at paras 18-20.
[5] *Ibid* at para 23.
[6] *Ibid* at para 24.
[7] *Ibid* at para 26.
[8] *Ibid* at para 25.
[9] *Ibid* at para 26.
[10] *Ibid* at para 28.
[11] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014 2 SCR 257].
[12] *Ibid* at para 73.
[13] *Ross River Dena, supra* note 1 at para 30.
[14] *Ibid* at para 32.
[15] *Ibid* at para 33.
[16] *Ibid* at para 33.
[17] *Ibid* at para 33.
[18] *Ibid* at para 35.
[19] *Ibid* at para 36.
[20] *Ibid* at para 37.
[21] *Ibid* at para 38.
[22] *Ibid* at para 39.
[23] *Ibid* at para 45.
[24] *Ibid* at para 46.
[25] *Ibid* at para 48.
[26] *Ibid* at para 51.
[27] *Ibid* at para 54.
[28] *Ibid* at para 33.
[29] *Ibid* at para 33.
[30] *Ibid* at para 33.
[31] *Ibid* at para 54.
[32] *Ibid* at para 54.
[33] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765.
[34] *Mi'kmaq of PEI v Province of PEI et al*, 2018 PESC 20 [*Mill River*].
