Cassels

Proponents and Government Compromise Consultation Under Ontario's *Mining Act* in *Eabametoong First Nation v Minister of Northern Development and Mines*

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On July 16, 2018, a three judge panel of the Ontario Superior Court of Justice Divisional Court released its decision in *Eabametoong First Nation v Minister of Northern Development and Mines*.[1] The decision highlights how proponent statements and Crown responses can compromise the Crown's duty to consult, even in situations where the duty falls to the lower end of the *Haida Nation v British Columbia (Minister of Forests)*[2] consultation spectrum.

Facts

Since 2012, higher-impact mineral exploration activities in Ontario have required an exploration permit from the Ministry of Northern Development and Mines (the Ministry). Once an application for an exploration permit has been received from a proponent, the Director of the Ministry (the Director) identifies and notifies any Aboriginal communities that may be affected by the proposed activity. Those communities may provide the Director with written comments regarding any adverse effects the proposed activities may have on their existing or asserted Aboriginal or treaty rights, in which case the Director will instruct the proponent to consult with the Aboriginal community. The Director may request information regarding any arrangements reached with an Aboriginal community, or the efforts made to reach an agreement, before deciding whether to issue the exploration permit.[3]

In August, 2013, Landore Resources Canada (Landore), which held mineral claims in the traditional territory of the Eabametoong First Nation (Eabametoong),[4] contacted the Chief of Eabametoong to advise that they wished to conduct a drilling campaign in early 2014.[5] In response, the Chief wrote that Eabametoong would like to have a face-to-face meeting with Landore and wanted to enter into an "agreement in the form of an MOU or LOI."[6] In a letter of response, Landore welcomed the opportunity for a meeting, wrote that they too would "like to sign a Memorandum of Understanding with Eabametoong," and attached a proposed draft MOU.[7] Landore submitted its application for an exploration permit on October 10, 2013.

Following an initial meeting between Eabametoong and Landore in December 2013, a revised MOU was provided to Eabametoong.[8] Eabametoong held an internal meeting in early January 2014 where a number of concerns were raised regarding the proposed exploration activities. These concerns were shared with the Ministry which promised, but failed, to follow-up.[9]

Due to scheduling difficulties, a follow-up meeting between Eabametoong and Landore did not occur until July 2014.[10] At the end of the meeting, the CEO of Landore ***committed*** to a follow-up community meeting.[11] The promised follow-up meeting never occurred.

For nearly a full year after the July 2014 meeting, Eabametoong experienced a "community crisis."[12] Landore twice proposed meeting dates, but during this time, "neither party communicated any sense of urgency about setting up this meeting."[13]

In June 2015, Landore reached out to request a date for the follow-up meeting, stating that the MOU would be discussed.[14] The Chief emailed back suggesting a meeting in early August. Landore did not reply.[15] In the fall of 2016 the Ministry intervened to coordinate a meeting, proposing a date in January that Eabametoong accepted but Landore rejected.[16]

At a private meeting on January 19, 2016, between the Director and Landore, Landore expressed that it needed its exploration permit approved as soon as possible since it had entered into negotiations with Barrick Gold, a major mining company.[17] Following this meeting no further attempts were made by the Ministry or Landore to set up a community meeting.

On February 11, 2016, the Ministry wrote to Eabametoong, stating that it would make its decision in ten days "unless significant information identifying specific adverse impacts from the proposed activities is provided to me."[18]

On March 4, 2016, the Ministry shared proposed terms and conditions on the exploration permit to address concerns raised by the community at their January 2014 meeting,[19] and sought a response within seven days.[20] Despite receiving objections from Eabametoong, the Ministry granted the permit, essentially on the conditions it had originally proposed, on March 31, 2016,[21] concluding a two and a half year application process.

Court's Assessment

In reviewing the Ministry's decision to grant the exploration permit, the Court determined that the Crown's duty to consult fell at the lower end of the *Haida Nation* spectrum due to the fact that the lands are treaty lands and the effects of early exploration activities (in this case up to 20 drill holes)[22] are considerably less than other mining activities.[23] However, the Court noted that while the consultation did not require an agreement to be reached or a particular process to be followed, "whatever process the parties engaged in [must be] one that is genuinely aimed at listening to each other's concerns and being prepared to address those concerns."[24]

According to the Court, Eabametoong had developed a reasonable expectation that a further community meeting and an MOU would be part of the process.[25] Prior to February 11, 2016, the communications

received by Eabametoong had all pointed towards another meeting and the completion of an MOU.[26] As late as January 2016, the Ministry had been trying to facilitate the meeting.[27] When the Crown changed course in February 2016, it did so without any explanation to Eabametoong, and did so within the context of the Barrick Gold discussions.[28]

The Court also noted that though the Ministry knew Eabametoong had expressed a desire for an MOU to be completed before commencement of activities, the Ministry had not communicated to Eabametoong that no such requirement was necessary legally or in policy. The Court found this troubling, stating that "it cannot be honourable for a government body to allow its delegate to create expectations with an indigenous community (expectations that the government knows about) and then not let the community know that these expectations were 'contrary to legal requirements and MNDM policy.' "[29]

Finally, the Court noted that the consultation that occurred did not meet the bar of "talking together for mutual understanding."[30] Only one discussion occurred between Landore and Eabametoong following the receipt of initial Eabametoong concerns, after which the parties agreed to another face-to-face meeting. The Ministry's solicitation of comments in February and March 2016 did not reflect a genuine desire to engage in real, straightforward and honest consultation. Rather they appear to be notifications that a decision had basically been made, and that Eabametoong had a very short timeframe to raise concerns.

The Court concluded that the Ministry had not met its duty to consult, and set aside the permit.

Issues

The Court's decision raises two notable issues with regard to the duty to consult:

- To what extent do proponent statements and actions bind the Crown; and
- What "discussions" are required for consultation?

Issue 1: Proponent Actions may Bind the Crown

The decision highlights how proponent statements can increase the Crown's obligations pursuant to the duty to consult. The Court did not distinguish between actions of Landore and actions of the Ministry, when assessing the fulfillment of the Crown's duty to consult. The Court found that "clear expectations were created ***by the Crown and its delegate***" as to how consultation would be carried out.[31] These expectations included: (a) repeated statements and efforts made by Landore to suggest that a follow-up meeting would occur;[32] and (b) repeated indications by Landore that an MOU would be signed prior to the issuance of an exploration permit.[33]

Landore's statements regarding the expected follow-up meeting constrained how the Ministry could conclude consultation. While the Ministry could change the course of a consultation process in spite of any

expectations established by Landore, the Court noted that the Ministry had to do so in a way that advanced reconciliation.[34] In this case, no explanation for the change was provided to Eabametoong explaining why the Ministry had abandoned recent attempts to set up a community meeting.[35]

Landore's statements regarding the MOU constrained how the Ministry could act within its existing legal powers. Eabametoong expectations that an MOU would be signed in advance of an exploration permit, fostered partially by repeated Landore statements, restricted the Crown from stating that no law or policy required an MOU. The Court suggested that in order to rely on its legal rights, the Crown should have communicated its position (that MOUs were not required) to Eabametoong and allowed Eabametoong "to address it." It's not clear what "to address it" means in this context. While it may suggest some sort of negotiation or dialogue, at the very least it suggests that the Crown is responsible for ensuring Indigenous parties have an accurate perception of the consultation process.

Issue 2: What "Discussions" are Required for Consultation

The decision raises uncertainty with regard to the reasonable content of consultation. The Court could have simply determined, based on the expectations created by Landore regarding a follow-up meeting and an MOU, that further consultation was required. However the Court also suggested that the consultation itself was incapable of meeting the bar of "talking together for mutual understanding."[36]

In many ways, consultation did occur. Eabametoong recorded their concerns with the proposed exploration activity in January of 2014, and shared them with the Ministry.[37] The Ministry reviewed these concerns internally[38] and provided Eabametoong with possible terms and conditions to address the community's concerns.[39] Though only seven days were provided for feedback (potentially discounting any real consultation value), consulting on the ***content of permit conditions*** may not have been required; the Supreme Court in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*[40] appeared to view the provision of conditions as satisfactory accommodation, not as a step to further consultation.[41]

The Court suggests that the Ministry should have "listen[ed] to Eabametoong's concerns, provided feedback about those concerns" and "discuss[ed] ways to meet those concerns (if possible)."[42] The difference between the Court's outlined process and the process undertaken appears to be the involvement of "discussions" and the provision of feedback.

The Court's expectations regarding adequate consultation, particularly in the context of Landore and the Ministry's apparently truncated process, is challenging to interpret. Considered alone, the consultation provided in this decision does not appear inconsistent with other satisfactory consultation efforts, including those seen in *Chippewas of the Thames*. Landore and the Ministry shared relevant information, received comments, considered the comments when determining accommodation, and provided an opportunity for further comments, including with regard to the proposed accommodation.

If the Court's concern with the lack of "discussion" between the parties refers to the Ministry's unexpected and urgent call for comments, such concerns appear focused on the reasonable expectations created by the Ministry and Landore (Issue 1), rather than any deficiency in the ***content*** of the consultation itself. Alternatively, if the Court is suggesting that the content of negotiation was missing "discussion," further information is required to understand if "discussion" refers to negotiation, which the duty to consult does not require,[43] or some other form of engagement. The decision itself does not provide useful specificity on what additional content, if anything, was required for the Ministry to provide reasonable consultation in this regard.

Implications

For proponents, the Court provides an important reminder that proponent actions, especially when not clear, consistent, or forthright, can undermine the fulfillment of the Crown's duty to consult. Landore made repeated statements suggesting that an MOU would be signed and that a follow-up meeting would occur. To the extent that these statements reflected its intentions, Landore should have followed through or have been very clear why it could not. Simply making positive noises regarding reconciliation, without an intention to follow through, creates false impressions, undermining the quality of consultation and the pursuit of reconciliation.

For governments, the decision is an important reminder that the consultation activities of proponents, and the expectations of Indigenous parties, must be examined carefully. Statements made by proponents may bind the Crown, to the extent that they create reasonable expectations for Indigenous parties. If the Crown decides to act in a manner inconsistent with these expectations, it must do so through dialogue, and in a timely manner.

While both Landore and the Ministry made errors in their consultation with Eabametoong, a larger issue remained unexamined by the Court: what is the effect for all parties when a three month process becomes a two and a half year process? Consultation takes time and energy for all parties. Ever-expanding timelines use up resources and are disadvantageous for everyone. Efforts, through legislation or policy, which encourage all parties to advance consultation in a timely and reasonable fashion would be a useful step towards sustainable and mutually-beneficial reconciliation.

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[1] *Eabametoong First Nation v Minister of Northern Development*, 2018 ONSC 4316 [*Eabametoong*].
[2] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*].
[3] *Eabametoong, supra* at para 18.
[4] *Ibid* at para 1.
[5] *Ibid* at para 33.
[6] *Ibid* at para 34.
[7] *Ibid* at para 35.
[8] *Ibid* at para 40.
[9] *Ibid* at para 44.
[10] *Ibid* at para 46.
[11] *Ibid* at para 47.

[12] *Ibid* at paras 48, 122.
[13] *Ibid* at para 48.
[14] *Ibid* at para 49.
[15] *Ibid* at para 50.
[16] *Ibid* at paras 52, 54.
[17] *Ibid* at para 58.
[18] *Ibid* at para 65.
[19] *Ibid* at para 70.
[20] *Ibid* at para 70.
[21] *Ibid* at para 73.
[22] *Ibid* at para 36.
[23] *Ibid* at para 91.
[24] *Ibid* at para 92.
[25] *Ibid* at para 109.
[26] *Ibid* at paras 97, 109.
[27] *Ibid* at para 109.
[28] *Ibid* at para 111.
[29] *Ibid* at para 118.
[30] *Ibid* at para 120.
[31] *Ibid* at para 4.
[32] *Ibid* at paras 47, 48.
[33] *Ibid* at paras 35, 40, 45, 49.
[34] *Ibid* at para 110.
[35] *Ibid* at para 113.
[36] *Ibid* at para 120.
[37] *Ibid* at para 43.
[38] *Ibid* at para 117.
[39] *Ibid* at para 70.
[40] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41[*Chippewas of the Thames*].
[41] *Ibid* at para 64.
[42] *Eabametoong, supra* at para 120.
[43] *Mi'kmaq of P.E.I. v. Province of P.E.I. et al., 2018 PESC 20* at para 177; *Pimicikamak et al v Her Majesty the Queen in Right of Manitoba et al*, 2016 MBQB 128 at para 45; *Sapotaweyak Cree Nation et al. v. Manitoba et al.*, 2015 MBQB 35 at para 214.
