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Consultation & Aboriginal Title - Important Lessons in *Mi'kmaq of PEI v Province of PEI et al.*

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June 28, 2018

On June 25, 2018, the Supreme Court of Prince Edward Island released its decision in *Mi'kmaq of P.E.I. v Province of P.E.I. et al*.[1] (the Mill River Decision) addressing the decision of the Government of Prince Edward Island (the Province) to dispose of the Mill River Resort complex (the Resort or the Lands).

The Mill River Decision provides important direction for how governments and project proponents address the alienation of Crown lands, related Crown consultation, and the liability associated with the potential finding of Aboriginal title. The decision summarizes and clearly reiterates core elements of effective consultation, providing useful guidance for all parties participating in consultation.

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Facts

The Resort, owned by the Province, is a golf resort, hotel, campground and fun-park located in western Prince Edward Island, and has been operating since 1983.[2] In recent years the Resort has been losing money on its golf course operations,[3] and in 2012 the Province issued a Call for Expression of Interest to attract potential purchasers of the Resort.[4] In advance of the Call for Expression of Interest, the Province gave notice to the Mi'kmaq of Prince Edward Island (the Mi'kmaq), who have claimed Aboriginal title to all of Prince Edward Island.[5]

Correspondence between 2013 and 2016 included assertions by the Mi'kmaq of Aboriginal title over all of Prince Edward Island[6] and assertions of traditional use and archeological sites[7] within or near the Resort. Throughout their correspondence with the Province, the Mi'kmaq "expressed that the Province required the 'consent' of the Mi'kmaq" before any conveyance of Crown land could be completed."[8]

In response, the Province shared information about the Resort,[9] sought information from the Mi'kmaq with regard to traditional and present-day use of the Resort,[10] and asked the Mi'kmaq to provide them with archaeological information that could help them evaluate the disposal of the Lands.[11] The Province also asked the Mi'kmaq to specify how the transfer of the Resort would adversely impact any Aboriginal or treaty right, given that the site had been developed and used as a golf course and would continue to be used for

that purpose after its sale.[12]

While the Mi'kmaq asserted that they had engaged in traditional activities such as camping, hunting, clay gathering and wild fruit gathering in the areas around the Resort, with further assertions that camping took place directly on the Lands, "no information or evidence supporting those claims was provided"[13] other than very minimal descriptions. With regard to the Resort "area in general, and the Lands in particular, very little, other than assertions, was provided by the Mi'kmaq."[14] The "Mi'kmaq did not advise of any **adverse impact** on its traditional uses of the land or its Aboriginal right or title as a result of the contemplated transfer of land other than by the act of conveyance itself [emphasis added]."[15] Despite the Province's requests, "the Province did not receive any additional information which would tend to support the claim for title."[16]

On January 10, 2017, the Province approved the sale of the Resort to a private purchaser[17] who intended to continue operating the Resort.[18] The Mi'kmaq filed a Judicial Review on February 8, 2017, requesting that the sale be stopped.

Justice Gordon Campbell concluded that there would be little-to-no adverse impact on the rights claimed as a result of a transfer of the Resort.[19] Given this minimal potential infringement, the duty to consult was, at most, at the **low end of the *Haida Nation*[20] spectrum**,[21] while the Province's consultation efforts were sufficient to satisfy the requirements associated with a duty **at the midrange of that spectrum**.[22]

Interestingly, the Court noted on several occasions that the duty to consult may not have actually been triggered by the sale of the Resort.[23]

Issues

The Mill River Decision raises two notable issues with regard to the duty to consult and Aboriginal title:

- Whether the disposal of Crown land subject to asserted Aboriginal title is sufficient to trigger the duty to consult; and
- The obligations of the parties in conducting consultation.

Issue 1: Whether Disposal of Crown Land Subject to Asserted Aboriginal Title is Sufficient to Trigger the Duty to Consult

As set out in *Haida Nation*, there are three necessary requirements to trigger the duty to consult. First, the Crown must have knowledge of the asserted Aboriginal or treaty right. Second, there must be contemplated "Crown conduct." Third, the contemplated Crown conduct must have the **potential to adversely affect** the asserted Aboriginal or treaty right.[24]

In the Mill River Decision, the Province had received multiple assertions of Aboriginal title from the Mi'kmaq,

fulfilling the first requirement, and was contemplating the sale of the Resort, fulfilling the second requirement. he outstanding issue, which the Court explored in depth, was whether the disposal of the Resort by the Crown, to a purchaser who intended to continue operating the Resort in a similar fashion, constituted an “adverse affect.”

The Court noted that simply selling the Resort would not prevent the Mi’kmaq from obtaining a future remedy. “The act of transferring the Lands does not negate the Province’s obligation to the Mi’kmaq if indeed the Mi’kmaq claim of title is eventually proven.”[25] The Court noted that “the Government has certain powers at its disposal to address any future finding of right or title. Transferring Crown lands, providing monetary compensation, or even expropriating lands held by third parties are all options.”[26] As a result, to the extent that the interest of the Mi’kmaq was simply in indistinct land, alienation by the Crown would not prevent a future cure, either through financial compensation or the provision of alternative lands, if Aboriginal title were established.

The Court noted that the Resort was “less than 0.02%, or 2 one-hundredths of one percent, of the overall lands claimed [by the Mi’kmaq].”[27] It also noted that “a conveyance of land does not, in and of itself, cause any physical or structural change in the land. The lands are not denuded or destroyed or altered from their current form and use by the act of such conveyance.”[28] The Court’s comments appear to juxtapose the sale of the Resort against the circumstances in *Haida Nation*, where Chief Justice McLachlin stated that “The stakes are huge. [...] Forests take generations to mature ... and old-growth forests can never be replaced.”[29]

The Court concluded that each piece of land needs to be considered independently,[30] considering whether there are any new and present adverse impacts from the contemplated Crown conduct and whether the conduct will put the exercise of the potential right/claim in jeopardy in some way.[31] The Court did not appear to perceive simple Crown alienation as being sufficient to incur real jeopardy.[32]

Issue 2: The Obligations of the Parties in Conducting Consultation

In examining the jurisprudence regarding consultation, the Court enumerated “the following principles [of consultation]:

a) the degree of consultation required lies on a spectrum set out in *Haida Nation*;
b) the Crown is bound by its honour to balance societal and Aboriginal interests;
c) at all stages, good faith on both sides is required;
d) there must be a meaningful process of consultation;
e) there is no duty to reach agreement;
f) consultation is not a one-way street;
g) both parties must actively engage in the process;
h) both parties must act to advance their respective rights in a prompt and conciliatory way;
i) the consultation process does not have to be perfect;

j) there must be a causal relationship between the contemplated conduct and the perceived adverse impact; past wrongs do not suffice;
k) there must be an appreciable adverse effect on Aboriginal rights;
l) mere speculative impacts will not suffice;
m) Aboriginal complainants must not frustrate the Crown's reasonable good faith attempts;
n) unreasonable positions must not be taken to thwart government decisions;
o) the process does not give Aboriginal groups a veto over what can be done with the land pending final proof of claim;
p) Aboriginal consent is only required in cases of proven title."[33]

The Court also clarified specific consultation elements which arose between the Mi'kmaq and the Province. The Mi'kmaq had claimed it was the Province's duty to undertake research to uncover past traditional uses of the Lands by the Mi'kmaq. According to the Court, the evidentiary burden lay with the Mi'kmaq to demonstrate the strength of their claim.[34] While the Mi'kmaq had insisted "they had a veto based on the fact that they had asserted title to the Lands,"[35] the Court affirmed that there is no requirement that an agreement be reached in consultation.[36] While the Mi'kmaq had "perceived that the consultation process should be in the form of a negotiation,"[37] the Court stated that the Crown was not required to enter into negotiation in the process of consultation.[38]

Implications

The Mill River Decision provides useful guidance on the duty to consult generally, the duty to consult in respect of Aboriginal title, and the Crown's potential liabilities and obligations if Aboriginal title should be established.

Implication 1: Clarifying Consultation Expectations

While the Crown bears the duty to consult, the list of consultation principles set out in the Mill River Decision appears to focus on mutual obligations and the expectations of Aboriginal parties. Only two of the principles appear expressly targeted at the Crown, while at least four are addressed expressly to the Aboriginal party, and five set out shared obligations.

In setting out clear "principles of consultation," the Court emphasized the importance of consultation being a two-way process. Effective consultation requires practical, meaningful and fulsome engagement. The Court's focus on the bilateral elements of consultation and the obligations specific to Aboriginal peoples emphasizes the practical necessities of effective consultation. The process of consultation does not require negotiation[39] or consent.[40]

Requesting information with regard to Aboriginal rights from the Mi'kmaq, sharing archaeological information and information regarding the proposed transaction, and seeking to clarify uncertainty, all

contributed to an effective consultation process. As the Court notes, “the Government made reasonable efforts to inform and consult.”[41] “They met, and exceeded, their duty to engage in meaningful consultation and to act in good faith towards the Aboriginal people and interests which might be impacted by their contemplated land transfer.”[42]

Implication 2: The Duty to Consult with Respect to Aboriginal Title

The Mill River Decision does not appear to empower governments to freely alienate Crown land. “Whether the act of transferring land is to be considered an adverse impact triggering the duty to consult is a determination to be made in the context of each case.”[43] Governments must consider whether the transfer will result in a “new and present adverse impact,”[44] such as a physical change to lands which results in a future declaration of title becoming “hollow.”[45]

Crown land disposals involving: (i) already developed properties; (ii) properties which will continue generally without alteration; or (iii) properties that may be altered in a way that may eventually be remediated and restored, are examples of circumstances less likely to trigger the duty to consult. In contrast, disposal of Crown land which could result in permanently altering its traditional uses, such as the drainage of wetlands, the introduction of heavy pollutants, and the permanent destruction of traditional resources, would be more likely to trigger the duty to consult.

Implication 3: The Crown’s Potential Liabilities and Obligations if Aboriginal Title is Established

The assessment of whether the Crown has a duty to consult with regard to land does not appear to impact the Crown’s potential liability if Aboriginal title is established. As the Court notes, “the act of transferring the Lands does not negate the Province’s obligation to the Mi’kmaq if indeed the Mi’kmaq claim of title is eventually proven.[46] By outlining the powers of the Province to address a future finding of Aboriginal title, the Court infers that governments may be required to transfer Crown lands, provide monetary compensation, or even expropriate lands held by third parties,[47] though determination of the appropriate tool is likely at the Crown’s descretion.

The Crown’s potential liability for a claim of Aboriginal title arising with respect to a newly disposed property may not differ significantly from property long ago issued in fee simple. It appears from the Mill River Decision that the Crown could be liable for an assertion of Aboriginal title over either type of property. Practically speaking however, disposing of Crown land alienates from the Crown the most simple cure for proven Aboriginal title: the original lands.

What is unclear from the Mill River Decision is under what circumstances the Crown may justifiably infringe on Aboriginal title so as to avoid liability. Lamer C.J. of the Supreme Court stated in *Delgamuukw* that Aboriginal title could be infringed by such activities as “the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the

environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims."[48] It is unclear whether such justified infringements of Aboriginal title avoid or alleviate the liability of the Crown in relation to Aboriginal title referred to in the Mill River Decision.

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[1] *Mi'kmaq of P.E.I. v Province of P.E.I. et al*. 2018 PESC 20 [*Mill River*]
[2] *Mill River, supra* at para 1.
[3] *Mill River, supra* at para 2.
[4] *Mill River, supra* at para 3.
[5] *Mill River, supra* at paras 112, 113.
[6] *Mill River, supra* at paras 31, 34, 51.
[7] *Mill River, supra* at paras 29, 34, 40, 42.
[8] *Mill River, supra* at para 21.
[9] *Mill River, supra* at paras 32, 35, 47.
[10] *Mill River, supra* at paras 32, 35, 37, 41, 45.
[11] *Mill River, supra* at paras 127, 129.
[12] *Mill River, supra* at para 127.
[13] *Mill River, supra* at paras 123, 124.
[14] *Mill River, supra* at para 124.
[15] *Mill River, supra* at para 53.
[16] *Mill River, supra* at para 130.
[17] *Mill River, supra* at para 55.
[18] *Mill River, supra* at para 49.
[19] *Mill River, supra* at para 159.
[20] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*]
[21] *Mill River, supra* at para 179.
[22] *Mill River, supra* at para 179.
[23] *Mill River, supra* at paras 88, 179.
[24] *Mill River, supra* at para 74.
[25] *Mill River, supra* at para 80.
[26] *Mill River, supra* at para 83.
[27] *Mill River, supra* at para 80.
[28] *Mill River, supra* at para 82.
[29] *Mill River, supra* at para 90.
[30] *Mill River, supra* at para 88.
[31] *Mill River, supra* at para 87.
[32] *Mill River, supra* at para 82.
[33] *Mill River, supra* at para 108.
[34] *Mill River, supra* at para 168.
[35] *Mill River, supra* at para 169.
[36] *Mill River, supra* at para 177.
[37] *Mill River, supra* at para 166.
[38] *Mill River, supra* at para 177.
[39] *Mill River, supra* at para 177.
[40] *Mill River, supra* at para 167.
[41] *Mill River, supra* at para 179.
[42] *Mill River, supra* at para 179.
[43] *Mill River, supra* at para 88.
[44] *Mill River, supra* at para 87.
[45] *Mill River, supra* at para 84.
[46] *Mill River, supra* at para 80.
[47] *Mill River, supra* at para 83.
[48] *Delgamuukw v. British Columbia*, 1997 CanLII 302 at para 165.

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