Cassels

Aboriginal Law

CASE LAW UPDATE 2021

May 6, 2021

Thomas Isaac
Jeremy Barretto
Arend J.A. Hoekstra
Emilie Lahaie
Grace Wu

Disclaimer

This webinar is provided for general information purposes only.

Cassels is not providing legal or other advice to any webinar participants.

Webinar participants should obtain independent legal and other advice from their legal and/or accounting advisers, as applicable.

Cassels

CPD

LAW SOCIETY OF ONTARIO accredited EDI

AB: Please consider including this program as a learning activity in your mandatory annual CPD Plan.

BC: This program has been approved by the Law Society of British Columbia for 0.25 CPD Hours (Practice Management) and 1.25 CPD Hours (Corporate).

ON: This program contains 15 minutes of EDI Professionalism content and 1 hour and 15 minutes of Substantive content. Cassels Brock & Blackwell LLP has been approved as an Accredited Provider of Professionalism Content by the Law Society of Ontario.

Agenda

- **Nine Years, Two Appeals & One Pipeline** (Jeremy Barretto)
- **Crown's Duty to Consult Aboriginal Peoples 2021** (Arend J.A. Hoekstra)
- **Indigenous Identity** (Emilie Lahaie & Grace Wu)
- **General Case Law Updates** (Grace Wu)

Cassels

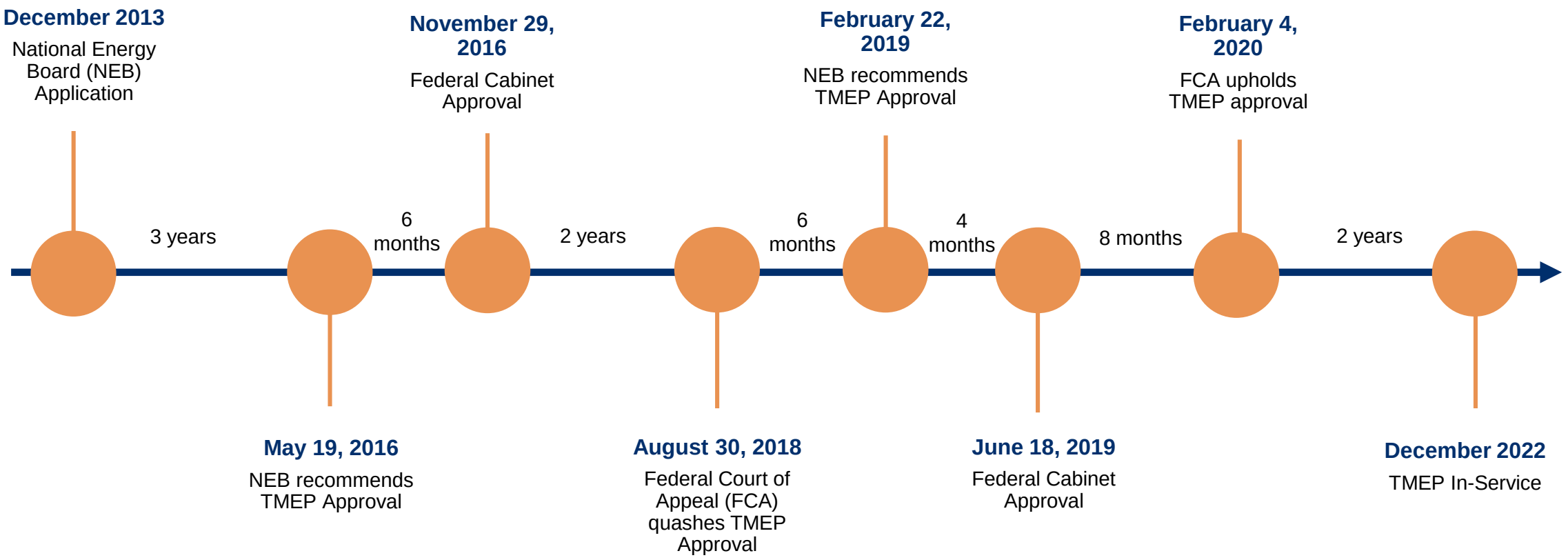
Nine Years, Two Appeals & One Pipeline

THE FEDERAL COURT OF APPEAL DECISIONS ON THE TRANS MOUNTAIN EXPANSION PROJECT

May 6, 2021

Jeremy Barretto

Nine Year Timeline from Pipeline Application to In-Service



Coldwater First Nation v. Canada (Attorney General), 2020 FCA 34

- Facts
  - *Coldwater* concerns the Trans Mountain expansion project; ***Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153**, is an earlier case on the Project, and it provides some helpful background when examining Coldwater (facts of *Tsleil-Waututh* below)
    - In 2013, Trans Mountain submitted an application to the National Energy Board (NEB) seeking approval for the Project
    - In 2016, the NEB issued a report recommending the approval of the Project; the Governor in Council (Canada) accepted this recommendation and issued an Order in Council approving the Project
    - Several groups brought applications for judicial review of NEB's report and the Order in Council
    - The Court quashed Canada's approval of the Project:
      - NEB unjustifiably excluded pertinent information related to the Project's environmental effects, leading to unacceptable deficiencies in NEB's report and recommendations
      - Canada failed to adequately discharge its duty to consult, specifically due to a lack of meaningful two-way dialogue during Phase II

Coldwater First Nation v. Canada (Attorney General), 2020 FCA 34

- Facts
  - Following *Tsleil-Waututh*, Canada renewed its consultations with potentially-affected Aboriginal groups and requested the NEB to perform a more thorough analysis on the Project's environmental effects
  - In 2019, after renewed consultations and thorough analysis, Canada approved the Project for a second time
    - This approval was issued with reasons and an explanatory note with additional reasons
  - Several groups brought applications for judicial review of Canada's 2019 decision to approve the Project (considered in *Coldwater*)

Coldwater First Nation v. Canada (Attorney General), 2020 FCA 34

- Outcome – Application Dismissed
  - The Court's role was to determine the reasonableness of Canada's decision, not whether the Court would have preferred that Canada conducted its consultations differently
  - There was no basis for interfering with Canada's decision to approve the Project
    - Canada renewed its consultations with the potentially-affected Aboriginal groups and retained experts in Aboriginal matters to oversee its consultations and to provide guidance
    - Canada provided detailed reasons to the potentially-affected Aboriginal groups and the public
- Significance
  - Reasonable consultation only requires the Crown to show that it has considered and addressed the rights claimed by Aboriginal peoples in a meaningful way
  - Reasonable consultation does not require agreement as an outcome
  - Application of reasonableness standard of review from *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65

Requirements for “Reasonable” and “Meaningful” Consultation

1. A process that was more than just an opportunity to blow off steam;
2. The Crown possessing a state of open-mindedness about accommodation;
3. The existence of two-way dialogue;
4. The process being more than a process for exchanging and discussing information;
5. Dialogue that leads to a demonstrably serious consideration of accommodation; and
6. The Crown grappling with the real concerns of the Indigenous applicants.

Key Principles in Reviewing Consultation Undertaken

1. The goal is to reach an overall agreement, but that will not always be possible;
2. Perfection in the consultation process is neither required nor realistic;
3. Failure to accommodate in any particular way, including by way of abandoning the Project, does not necessarily mean that there has been no meaningful consultation;
4. Where there is genuine disagreement about whether a project is in the public interest, the law does not require that the interests of Indigenous peoples prevail; and
5. Although Indigenous peoples can assert their uncompromising opposition to a project, they cannot tactically use the consultation process as a means to try to veto it.

Cassels

Crown's Duty to Consult Aboriginal Peoples 2021

CASE LAW UPDATE

May 6, 2021

Arend J.A. Hoekstra

Outline

- Case law update
  - *i.* *R v Desautel*, 2021 SCC 17
  - *ii.* *Nunatsiavut Government v Newfoundland and Labrador*, 2020 NLSC 129
  - *iii.* *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resources Operations)*, 2020 BCCA 215
  - *iv.* *'Namgis First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2020 FCA 122
  - *v.* *Foxgate Developments Inc v Doe et al*, 2020 ONSC 5038
  - *vi.* *Foxgate Developments Inc v Doe et al*, 2020 ONSC 6529

Cassels

Case Law Update

2020–2021

R v Desautel, 2021 SCC 17

- Citizen/resident of US shot a cow-elk in BC and charged for hunting without a license and hunting big game while a non-resident of the province under the *Wildlife Act*
- Argued that, as a member of the Lakes Tribe in Washington State, he had an Aboriginal right to hunt on ancestral lands protected by s. 35(1)
  - Lakes Tribe is successor group to Sinixt people
  - Lakes Tribe hunted in BC until 1930
- Lower courts found that he was exercising his Aboriginal right to hunt for ceremonial purposes in traditional territory

R v Desautel – Majority

- Considered the meaning of "[A]boriginal peoples of Canada" in s. 35(1)
  - Dual purposes of s. 35(1): to recognize the prior occupation of Canada by organized, autonomous societies and to reconciled their modern-day existence with the Crown's assertion of sovereignty over them
  - *Sparrow*: found that First Nations had Aboriginal rights protected by s. 35(1) as they "have lived in the area as an organized society long before the coming of European Settlers"
  - *Sappier*: doctrine of Aboriginal rights "arises from the simple fact of prior occupation of the lands now forming Canada… The 'distinctive aboriginal culture' must be taken to refer to the reality that, despite British Sovereinty, aboriginal people were the original organized society occupying and using Canadian lands"
  - Honour of the Crown:
    - Looks back and recognizes the impact of "superimposition of European laws and customs" on pre-existing Aboriginal societies
    - Looks forward to reconciliation between Crown and Aboriginal peoples in ongoing, "mutually respectful long-term relationship"

R v Desautel – Majority

- Recognizes the existence of autonomous, organized societies predating the settlers
- Recognizes the impact and effect of displacement
  - Interpreting “aboriginal peoples of Canada” to include Aboriginal people “who were here when the Europeans arrived and later moved or were forced to move elsewhere, or on whom international boundaries were imposed, reflects the purpose of reconciliation”
- Recognizes the purpose of reconciliation
  - “An interpretation that excludes Aboriginal peoples who were forced to move out of Canada would risk ‘perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers’”
- Recognizes that s. 35(1) did not *create* Aboriginal rights
  - Aboriginal rights predate the arrival of the *Constitution Act, 1982*
  - To limit scope of s. 35(1) to only those present in Canada in 1982 would fail to recognize the existence of those rights and treat s. 35(1) as the *source* of Aboriginal rights

R v Desautel – Majority

- Majority upheld lower court decision
  - Held that "[A]boriginal peoples of Canada" in s. 35(1) means the modern successors of Indigenous societies occupying Canadian territory at the time of European contact
    - Meaning: successors do not need to be in Canada in 2021
  - Once a group establishes it is an "[A]boriginal peopl[e] of Canada", must then satisfy criteria set out in *R v Van der Peet*, [1996] 2 SCR 507 to prove Aboriginal Rights
    1. Characterize the right claimed in light of the pleadings and evidence
    2. Determine whether the claimant has proven that a relevant pre-contact practice, tradition or custom existed and was integral to the distinctive culture of the pre-contact society
    3. Determine whether the claimed modern right is "demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice"
       - Dissent held that continuity of hunting practices was not established

R v Desautel – Duty to Consult: Majority

- Different onus on the Crown for those outside of Canada:
  - "In the absence of some historical interaction with them, the Crown may not know, or have any reason to know, that they exist, let alone that they have potential rights within Canadian territory"
  - *No duty on Crown to seek out Aboriginal groups outside of Canada in the absence of actual or constructive knowledge*
- Onus is on affected groups to provide notice
  - Crown free to act *until such notice is given*
  - Once notice is given, Crown must determine: (i) whether duty exists, and if so, (ii) the scope of that duty

R v Desautel – Implications

- SCC deferred on potential issues
  - Duty to consult
    - Scope of Crown's duty to consult groups outside of Canada
    - "[M]anner in which [duty to consult] is given effect"
    - *How* to integrate groups outside Canada into consultation discussions with the Crown and groups inside Canada
  - Extent to which an Aboriginal right held by a group outside Canada affects the *Sparrow* test for justifying an infringement on Aboriginal or treaty rights
  - Treatment of Aboriginal title
    - Test is different than that for Aboriginal rights
      - Historic date for proof of title is the date of Crown sovereignty, not date of contact
      - Title requires proof of exclusive occupation of territory
  - Treatment of modern treaties

R v Desautel – Implications

- *Squamish Nation v British Columbia*, 2018 BCSC 844
- Cross-border treaties
  - Potential impacts on Crown entering into cross-border treaties
  - Termination of treaties
- Obligation of Crown to enter *into* treaties
- Right or obligation of First Nations to be consulted as a result of treaty membership

Nunatsiavut Government v Newfoundland and Labrador, 2020 NLSC 129

- Labrador Inuit Land Claims Agreement (the "**Treaty**") negotiated between (what is now) the Nunatsiavut Government, Newfoundland and Labrador, and Canada
- Treaty came into effect in 2005
- Voisey's Bay
  - Location of vast nickel reserves
  - Traditional area of Inuit hunting, fishing, and gathering
- Treaty provides for:
  - Revenue sharing to the Nunatsiavut Government in exchange for Inuit not seeking title to Voisey's Bay
  - Governments' duty to consult prior to deciding applications for permits, orders, other activities in Voisey's Bay

Nunatsiavut Government – Background

- Province entered into development agreement with developer regarding mining of nickel deposits
  - Inuit not party to negotiation, not consulted on terms
- Development agreement provided for construction of capital projects off-site
  - Capital project costs outside Voisey's Bay could be deducted under applicable tax legislation
- Subsequent amending agreements between Province and developer
  - No consultation with Inuit
- Result of amending agreements and deductions:
  - Province and Inuit received revenue for ten years
  - Developer then began deducting costs
    - Province continued to receive revenue
    - Inuit share dropped to zero and would stay there for foreseeable life of the project

Nunatsiavut Government – Holding

- Revenue sharing is to be calculated without reference to costs incurred outside Voisey's Bay
- Payments to the Province under the development agreement and amending agreements are "revenues" subject to revenue sharing
- Province breached fiduciary obligations to Nunatsiavut Government through administration and determination of revenue sharing under the Treaty
- Province breached duty to consult
  - Failed to consult with Inuit before entering into amending agreements
  - Failed to consult with respect to capital project tax treatment and impact on Inuit share of revenue
  - Province was aware and advised of duty by Auditor General, but ignored advice

Nunatsiavut Government – Takeaways

- Breach of consultation obligations under Treaty means that the court did not consider whether there was a breach of the duty to consult at common law
- Crown assumed discretionary control over a specific Aboriginal interest in Voisey's Bay, which gives rise to a fiduciary duty in favour of the affected Aboriginal peoples
  - Crown assumed *de facto* control of the area
  - Crown owes the Inuit a duty of loyalty, good faith and full disclosure
- Treaty was not a commercial contract and should not be interpreted as such – rather, it is a "nation-to-nation agreement" and must be interpreted in a generous manner
- Duty to consult is proactive, requires meaningful exchanges of information
- "After-the-fact delivery of information that the Province has concluded an agreement with the developer without any Aboriginal participation is a breach of the treaty, a breach of the Province's ongoing fiduciary duty and impairs the honour of the Crown"

Gamlaxyeltxw v British Columbia…, 2020 BCCA 215

- Gitanyow peoples' territory overlaps with Nis*g*a'a treaty land
- Crown was aware of Gitanyow assertions of Aboriginal rights
- Decisions by the Minister on (i) total allowable harvest of moose and (ii) wildlife management plan pursuant the Nis*g*a'a treaty
  - Minister consulted Gitanyow on total allowable harvest
    - Gitanyow took the position that the Minister should accommodate their interests by reducing the allocation of moose to Nis*g*a'a hunters in a manner inconsistent with the Nis*g*a'a treaty
  - Minister did not consult on wildlife management plan
    - Minister took the position that it had no potential to adversely affect Gitanyow interests
- Gitanyow alleged:
  - Inadequate consultation on harvest of moose
    - Specifically, the number of moose the Gitanyow could harvest
  - Owed duty to consult on wildlife management plan, alleging that plan was resulting in a decrease in number of moose on their territory

Gamlaxyeltxw

- Consultation on allocation of harvest of moose was adequate
- No duty to consult with Gitanyow on wildlife management plan as it would be inconsistent with duties under the Nis*g*a'a treaty
  - Plan was not applicable to non-Nis*g*a'a hunters, nor did it adversely affect Gitanyow rights
- BCCA rejected BCSC-proposed modification to Haida test to account for treaty rights
  - Would add a fourth element to the test, asking whether a duty to consult would be inconsistent with the Crown's duties under a treaty such that it would negatively impact the treaty nation's rights
- No duty to consult with Gitanyow on future wildlife management plans
  - Where any given plan may have an appreciable adverse impact on Gitanyow, duty may arise – but that is to be assessed on the circumstances at the time

Gamlaxyeltxw

- Agreed with BCSC on outcome
- It remains that duty to consult arises with:
  - The Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right;
  - Contemplated Crown conduct; and
  - The potential that the contemplated conduct may adversely affect an Aboriginal claim or right
- Held that the test is sufficiently flexible to account for situations with overlap of Aboriginal rights and treaty rights
  - Inquiry into impacts on treaty rights is more properly a matter of accommodation that arises once consultation has begun
  - Crown can then determine the extent to which accommodation will impact treaty rights-holders

Gamlaxyeltxw – Duty to Consult

- Purpose of duty to consult "is not to provide claimants immediately with that they could be entitled to upon proving or settling their claims"
  - "Where the scope and extent of the claimed Aboriginal interests have not yet been determined, the duty to consult derives from the need to protect these interest while land and resource claims are ongoing"
- A "marginal potential adverse impact is not an appreciable adverse effect on [a First Nation]'s ability to exercise their Aboriginal right"

Gamlaxyeltxw – Accommodation

- Consultation from *Haida*:
  - "When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation *may* be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns *may* require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim…"
- *Gamlaxyeltxw*: "It may well fall within honourable dealing for the Crown to conclude after consultation that no accommodation is required, or accommodation different from that requested by the rights claimant is appropriate"

Gamlaxyeltxw

- Court held that three-step *Haida* test remains appropriate test even where a First Nations' asserted s. 35 rights may conflict with modern treaty rights – the test is appropriately flexible
- If Crown is aware of a credible claim for Aboriginal right and contemplates conduct that that might adversely effect the claimed right, duty to consult is always triggered
- Modern treaty rights do not necessarily prevail over duty to consult a non-treaty First Nation

'Namgis First Nation v Canada…, 2020 FCA 122

- The Minister of Fisheries and Oceans issued licenses for transfers of live fish from inland hatcheries into fish habitat
  - Appellant concerned about highly infectious virus called "PRV"
  - Condition for issuing a fish transfer license is that fish "do not have any disease or disease agent"
  - Departmental policy set out that the department would not test for PRV before issuing licenses
- Salmon farm operator was granted license
- Appellant *'Namgis* alleged that Crown breached its duty to consult on the new licenses
  - Applied to set aside the license on the grounds that the Minister breached his duty to consult and failed to accommodate concerns prior to issuing the license

'Namgis – Duty to Consult

- Was there a duty to consult about the issued license?
  - More specifically, because the Crown previously consulted on the policy and licensing regime, did a fresh duty to consult arise?
    - FCA clarified that lower court did not address the question of whether a novel adverse impact had arisen since the original consultation, which would create a fresh duty to consult
- FCA: novel adverse impact creates a fresh duty to consult
  - Rapidly changing science with respect to PRV creates a situation in which potential harms to fish stocks "may be greater than the Minister previously contemplated," giving rise to a fresh duty
  - Court previously found that finding of novel adverse impact which gave rise to duty to consult with respect to the *policy* also gave rise to duty to consult with respect to the grant of the *license*
- Appeal allowed – consultation with respect to the new licenses was required – but no remedy granted
  - License had expired: no utility to quashing a license that has expired
  - Other, more immediate options were available (i.e., injunction to prevent issuing the license)

'Namgis

- "Where adequate consultation has occurred with respect to an overall strategy or policy, further consultation is not required at every step taken to operationalize that strategy or policy. This assumes that there is no evidence of a novel adverse impact"
  - Two court decisions
    - Policy decision (not appealed): found that there was a novel adverse impact giving rise to a fresh duty to consult
    - License decision (appealed): the same evolution of science that was found to be a novel adverse impact with respect to the policy, must then apply to the operational licenses, and thus be a novel adverse impact

Foxgate Developments Inc. – Background

- Foxgate Developments has title to subject lands that were first granted to a private party in 1853
  - No claim registered on title by any Indigenous group, nor any indication of an Aboriginal interest in the land
- Foxgate began to develop the land
  - Underwent public approval process
  - No Indigenous groups provided input or opposition under the formal proceedings
- Individuals occupied the land, disrupting construction
  - Individuals claimed lack of consultation
  - Resorted to “self-help”

Foxgate Developments Inc v Doe et al, 2020 ONSC 5038 [Foxgate 1]

- Claimants of Aboriginal rights cannot be idle while legal processes proceed and then obstruct the process after-the-fact
- “If any representative group within the Aboriginal community wants to assert a constitutional right, they must assert it in a manner that is within an accepted process. Resort can be made to the Courts, the Land Claims Tribunal, or direct negotiations with the appropriate level of government. However, they cannot sit by and refuse to engage in *bona fide* consultations and legally accepted processes. They cannot resort to civil and potentially criminal behavior in order to achieve their goals.”

Foxgate Developments Inc v Doe et al, 2020 ONSC 6529 [Foxgate 2]

- Private entities do not owe a duty to consult
- Reinforces that Aboriginal rights are held collectively and cannot be asserted by individual members – Aboriginal rights must be asserted by a lawful representative
- Lack of objections through formal channels is telling
  - Foxgate still reached out to Elected Council of Six Nations of the Grand River (the "**Six Nations**") to allow for input
  - Foxgate entered into a definitive agreement with the Six Nations
    - Six Nations referred to the agreement as "accommodation"
- Individuals occupying the land did not have authorization from the Six Nations to assert Aboriginal rights

Foxgate Developments Inc. – Takeaways

- Reinforces principles of the duty of the consult
  - Consultation must be through the proper legal channels
  - Consultation must be through the proper representatives
  - Private parties do not have a duty to consult
  - Good faith on both sides is paramount
  - Consultation protects collective rights, not individual rights

Cassels

Indigenous Identity

CASE LAW & RECENT DEVELOPMENTS

May 6, 2021

Emilie Lahaie

Grace Wu

Overview

1. Indigenous Identity in Canada
2. Case Law
3. UNDRIP
4. Key Takeaways

Cassels

Indigenous Identity in Canada

What Does “Indigenous Identity” Mean in Canada?

- “Indigenous” is a broad term that has been used to refer to both s. 35 rights-holding Indigenous peoples and non-s. 35 rights-holding Indigenous peoples
  - There remains some uncertainty as to the scope and meaning of “Indigenous”
- “Aboriginal peoples of Canada” includes the Indian, Inuit, and Métis peoples of Canada
- “Indian” is the legal term that refers to individuals who have “Indian status” pursuant to the *Indian Act*

Why Is “Indigenous Identity” Different & Important?

- Domestic Law
  - Constitution (s. 91(24), *Constitution Act 1867*, and s. 35, *Constitution Act, 1982*)
  - Legislation (*Indian Act*, *First Nations Fiscal Management Act*, *First Nations Land Management Act*, etc.)
  - Extensive case law
- Crown – Indigenous Treaties and Agreements
  - Historic treaties
  - Modern treaties
  - Recognition of Indigenous Rights and Self-Determination discussion tables
- Canada’s Commitment to Reconciliation
  - “The Government of Canada is committed to achieving reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change.” *(Government of Canada website)*
- International Law
  - UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”)

Constitution

- S. 91(24), *Constitution Act, 1867*
  - Canada (federal government) has exclusive legislative authority over “Indians, and Lands reserved for the Indians”
  - “Indians” in s. 91(24) has a different meaning than that in s. 35 (*Daniels*)
- S. 35, *Constitution Act, 1982*
  - “‘Aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada.”
  - “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”
  - “Aboriginal and treaty rights” include, among other things, hunting, fishing, trapping, gathering, as well as a right to the land itself (Aboriginal title); these rights are collective in nature

Crown – Indigenous Treaties & Agreements

- Historic Treaties
  - Between 1701 and 1923, the Crown entered into treaties with Indigenous groups that defined the respective rights of Indigenous peoples and European newcomers
- Modern Treaties
  - Since 1975, Canada has signed additional treaties with Indigenous groups in Canada that form the basis of the parties' relationship (including, in some cases, with respect to self-government)
- Recognition of Indigenous Rights and Self-Determination Discussion Tables
  - Canada is working with Indigenous groups at over 80 discussion tables across the country to explore new ways of working together to advance the recognition of Indigenous rights and self-determination

Canada's Commitment to Reconciliation

- Canada has repeatedly indicated its commitment to advancing the process of reconciliation with Indigenous peoples.
  - "The Government of Canada is committed to achieving reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change." *(Government of Canada website)*
- Reconciliation flows from s. 35, *Constitution Act, 1982*, and it is inextricably tied to the honour of the Crown
- Reconciliation has two distinct elements:
  - Reconciliation between the Crown and Indigenous peoples; and
  - Reconciliation by the Crown of Indigenous interests with society's broader interests

Cassels

Case Law

R. v. Powley, 2003 SCC 43

- Facts
  - Steve and Roddy Powley shot, killed, and took possession of a bull moose without a hunting licence in the Sault Ste. Marie area
  - In defence, the Powleys argued that, as Métis, they have an Aboriginal right to hunt for food in the Sault Ste. Marie area that cannot be infringed by the Crown without proper justification
  - The lower courts acquitted the Powleys; the Crown appealed

R. v. Powley, 2003 SCC 43

- Outcome – Appeal dismissed
  - Members of the Métis community in and around Sault Ste. Marie have an Aboriginal right to hunt for food under s. 35(1), *Constitution Act, 1982*
    - Determined by their fulfillment of the *Van der Peet* requirements, modified to fit the distinctive purpose of s. 35 in protecting the Métis
- Significance
  - "The term 'Métis' in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears."

R. v. Powley, 2003 SCC 43

- Significance
  1. Characterization of the right being claimed
  2. Identification of the historic rights-bearing community
  3. Identification of the contemporary rights-bearing community
  4. Verification of the claimant's membership in the relevant contemporary community
  5. **Identification of the relevant time frame**
     a) "The test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land. … The focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs."
  6. Determination of whether the practice is integral to the claimants' distinctive culture
  7. Establishment of continuity between the historic practice and the contemporary right asserted
  8. Determination of whether or not the right was extinguished
  9. If there is a right, determination of whether there is an infringement
  10. Determination of whether the infringement is justified

Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12

- Facts
  - The Plaintiffs sought three declarations:
    - Métis and non-status Indians are “Indians” under s. 91(24), *Constitution Act, 1867*;
    - Federal Crown owes a fiduciary duty to Métis and non-status Indians; and
    - Métis and non-status Indians have the right to be consulted and negotiated with
  - Trial judge concluded that “Indians” under s. 91(24) is a broad term referring to all Indigenous peoples in Canada; he declined to grant the second and third declarations
  - Federal Court of Appeal upheld the first declaration, but narrowed its scope to include only those Métis who satisfied the *Powley* test, and to exclude non-status Indians; it declined to grant the second and third declarations
  - The Plaintiffs/Appellants appealed; the Crown cross-appealed arguing that none of the declarations should be granted

Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12

- Outcome – Appeal allowed in part; Cross-appeal dismissed
  - The first declaration should be granted: Métis and non-status Indians are "Indians" under s. 91(24), *Constitution Act, 1867* (broader scope)
    - "Indians" for the purpose of s. 91(24) is different than the use of "Indians" in s. 35, *Constitution Act, 1982*
  - Lower courts' decision to not grant the second and third declarations should be upheld
- Significance
  - Scope of the term "Indigenous," and the purposes for which the term "Indigenous" is intended to be used, remains unclear
  - The SCC employed the term "Indigenous" as a broad term which is likely synonymous with, or potentially broader than, the category described in s. 91(24)
  - Reconciliation for the purposes of s. 91(24) appears to be focused on the federal Crown remedying historic wrongs that it has committed against Indigenous peoples, including individuals, whether or not they are s. 35 Aboriginal peoples

R. v. Desautel, 2021 SCC 17

- Facts
  - Desautel is an American citizen and a member of the Lakes Tribe in Washington State; he was arrested and charged for hunting without a licence in the Arrow Lakes area of British Columbia (BC)
  - At trial, Desautel submitted that he was exercising his lawful Aboriginal right to hunt for ceremonial purposes in the traditional territory of his Sinixt ancestors, pursuant to Section 35(1), *Constitution Act, 1982*
  - Desautel provided evidence that his Sinixt ancestors had occupied territory in BC, including in the Arrow Lakes area where he was hunting, at the time of contact
  - Desautel also provided evidence that his Sinixt ancestors had hunted, fished, and harvested throughout their territory, and that the practice of hunting in the Arrow Lakes area has continued with the Lakes Tribe, who is the modern day successor collective of the Sinixt people
  - Desautel was acquitted; the Crown appealed to the BC Court of Appeal (dismissed) and then to the SCC

R. v. Desautel, 2021 SCC 17

- Outcome – Appeal Dismissed
  - Since 1872, several members of the Sinixt were living in Washington State, but continued to travel to British Columbia for hunting purposes
  - The Lake Tribe can be considered part of the "Aboriginal peoples of Canada," as moving to live in the American part of the Sinixt's ancestral territory does not prevent the Lake Tribe from being a successor group to the Sinixt
  - The test to determine the existence of Aboriginal rights is the same for groups outside of Canada as for those in Canada (*Van der Peet*)
- Significance
  - "Aboriginal peoples of Canada" means the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact, even if such societies are now located outside of Canada
  - Groups whose members are neither Canadian citizens nor Canadian residents may be considered part of the "Aboriginal peoples of Canada," and (if this initial threshold is met) they may claim Aboriginal rights under s. 35, *Constitution Act, 1982*

Cassels

UNDRIP

Overview of UNDRIP

- UNDRIP is an international, aspirational document that is not legally binding — instead, UNDRIP serves as a guide and a benchmark in the review of a country's human rights performance in respect of Indigenous peoples
- UNDRIP consists of 24 preambular statements and 46 articles (together, 74 distinct paragraphs), which delineate individual and collective Indigenous rights, including those pertaining to (among other things):
  - Lands, territories, and resources; and
  - Principle of FPIC

BC's Enactment of DRIPA

- On February 12, 2019, the British Columbia (BC) government announced its commitment to introduce legislation to implement UNDRIP
  - "BC will be the first province in Canada to introduce legislation to implement [UNDRIP], legislation co-developed with the First Nations Leadership Council and other Indigenous organizations." *(BC Throne Speech – 2/12/2019)*
- On October 24, 2019, the BC government introduced Bill 41, *Declaration on the Rights of Indigenous Peoples Act* (DRIPA), in the BC Legislature
- On November 26, 2019, the BC Legislature passed DRIPA unanimously

Content of DRIPA

- DRIPA's purposes are to:
  - Affirm the application of UNDRIP to BC laws;
  - Contribute to the implementation of UNDRIP; and
  - Support the affirmation of, and develop relationships with, Indigenous governing bodies
- DRIPA requires the BC government to "**take all measures necessary**" to ensure all BC laws are "consistent with" UNDRIP, through consultation and cooperation with the Indigenous peoples in BC
- DRIPA authorizes members of the Executive Council to enter into agreements with Indigenous governing bodies, on behalf of the government
- DRIPA consists of 10 sections, covering broad topics such as "Measures to align laws with [UNDRIP]," "Action Plan," and "Agreements"

Canada's Introduction of Bill C-15

- On September 23, 2020, Canada announced its commitment to introduce federal legislation to implement UNDRIP before the end of 2020
  - "The Government [of Canada] will move forward to introduce legislation to implement [UNDRIP] before the end of this year." *(Canada Throne Speech – 9/23/2020)*
- On December 3, 2020, Canada introduced Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, in the House of Commons
- Canada co-developed Bill C-15 after consulting with Indigenous peoples in Canada

Content of Bill C-15

- **Section 2(3): Nothing** in this Act is to be construed as **delaying the application of [UNDRIP] in Canadian law**.
- **Section 4(a):** The purpose of this Act is to affirm [UNDRIP] as a universal international human rights instrument **with application in Canadian law**.
  - "Instruments" represent a broad category of documents that include "declarations" and "treaties."
  - Canada cannot enforce compliance with international instruments in areas beyond its jurisdiction (i.e. cannot encroach on areas of provincial jurisdiction).
- **Section 5:** The Government of Canada must, in consultation and cooperation with Indigenous peoples, **take all measures necessary** to ensure that the laws of Canada are consistent with [UNDRIP].
- **Section 6(1):** The Minister must, in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve **the objectives** of [UNDRIP].

Next Steps for Bill C-15

- Bill C-15 will proceed through Canada's legislative process, during which time it may be amended
  - Currently, Bill C-15 is at the Second Reading in the House of Commons
- If Bill C-15 becomes law, it will provide a framework for Canada's implementation of UNDRIP
  - There is uncertainty as to how Canada (and British Columbia) can go about such implementation
  - It is unclear how both jurisdictions' respective "all measures necessary" standard can be implemented into law

Cassels

Key Takeaways

Key Takeaways

- Governmental/Judicial Identification vs. Community Identification
  - Is it appropriate for a colonial government and a colonial court to determine an individual's "Indigenous" identity?
  - Legacy of the *Indian Act*
- Is Self-Identification Sufficient?
  - Most individuals do not have to justify their heritage
  - Potential for non-Indigenous individuals to take advantage of the system
- Broad Spectrum of Rights
  - Different uses of "Indian" in s. 91(24), *Constitution Act, 1867* vs. s. 35, *Constitution Act, 1982*

Key Takeaways

- There remains significant uncertainty in this area of law
- Canadians look to the federal and provincial governments for direction. Without clear guidelines, organizations that work with, and for, Indigenous communities may face uncertainty as to how funds should be allocated or programs should be run
- Indigenous communities themselves do not always agree on who its membership consists of
- Case law provides some structure, but it also leaves additional questions for governments, Indigenous peoples, and Canadians generally to grapple with

Cassels

General Case Law Updates

May 6, 2021

Grace Wu

Overview

1. *Kwikwetlem First Nation v. British Columbia*
2. *Ahousaht Indian Band and Nation v. Canada (Attorney General)*

Kwikwetlem First Nation v. British Columbia, 2021 BCSC 458

- Background
  - Kwikwetlem First Nation ("KFN") seeks declarations of Aboriginal title over certain lands ("Claim Lands") in and around the City of Port Coquitlam
    - All of the Claim Lands are currently being held by one or more of the defendants in fee simple
  - KFN seeks, as well, various remedies including:
    - Damages for the unjustified infringement of KFN's Aboriginal title over the Claim Lands, and
    - An order that the province consult with KFN to provide an appropriate system to record and register claims of Aboriginal title against lands situated within British Columbia

Kwikwetlem First Nation v. British Columbia, 2021 BCSC 458

- Facts
  - KFN's reserve territory comprises 2 separate parcels of land: IR1 and IR2
  - In 2014, KFN engaged in discussions with the City for the provision of the City's water and waste management utilities, with a view to developing IR2
  - In 2016, in the midst of discussions, KFN commenced this action
  - Between 2016 and 2020, KFN and the City continued to engage in discussions (without prejudice, and/or legal counsel was present), but no resolution was reached
  - KFN sought an order that the Corporation of the City of Port Coquitlam ("City") produce certain documents ("Documents") within 14 days
  - The City opposed KFN's application on the basis that all of the documents are either irrelevant to the issues at hand or cloaked in privilege

Kwikwetlem First Nation v. British Columbia, 2021 BCSC 458

- Are the Documents Relevant?
  - The Documents are not relevant to the issues at hand
    - Courts in BC have determined that the duty to consult, on the part of the Crown, does not extend to a municipality
    - None of the concerns that led the Supreme Court of Canada ("SCC") in *Tsilhqot'in Nation* to address how to approach pleadings in land claim cases are present
      - The legal principles at play in this case have been clear from the outset
      - The evidence shows that KFN's development plan for IR2 is not yet established
      - While the rights KFN seeks to establish over the Claim Lands are plainly those that the SCC was addressing in *Tsilhqot'in Nation*, KFN's rights regarding the development of its reserve lands were not
    - KFN's pleadings do not put in issue the state of development of IR2

Kwikwetlem First Nation v. British Columbia, 2021 BCSC 458

- Are the Documents Privileged?
  - The Documents are not producible, as they are subject to evidentiary privileges
    - Settlement Privilege
      - All of the discussions involving both the servicing of IR2 and the resolution of this action were conducted on a without prejudice basis
      - The Documents created as part of these ongoing discussions are protected by settlement privilege
    - Solicitor-Client Privilege
      - At several of the discussions, the City's legal counsel was present to address issues relating to KFN
      - Further, draft letters and other documents prepared by the City's legal counsel were considered during such discussions
      - The Documents that are internal to the City are protected by solicitor-client privilege

Ahousaht Indian Band and Nation v. Canada (Attorney General), 2021 BCCA 155

- Facts
  - Long and complex litigation between Canada and 4 Nuu-chah-nulth First Nations over the First Nations' commercial fishing rights in their traditional territories
  - Litigation was divided into 2 phases:
    - First Phase
      - Considered whether the First Nations had an Aboriginal right to fish commercially, and whether Canada's regulatory regime infringed that right
    - Second Phase
      - Considered whether Canada's regulatory regime had **unjustifiably** infringed the First Nations' Aboriginal fishery rights
      - Decisions pertains to this second phase

Ahousaht Indian Band and Nation v. Canada (Attorney General), 2021 BCCA 155

- Issues
  - The Crown's Duty to Consult the First Nations
    - Trial judge did not err in finding that Canada did not breach its duty to consult, despite evidence that Canada had not granted its negotiators the necessary power to resolve the dispute until shortly before the trial
  - Judge's "Interpretation" of the Declaration Made in the First Phase
    - Trial judge erred in recharacterizing the Aboriginal rights declared in the first phase
    - She was not entitled to diminish or augment the declared right

Ahousaht Indian Band and Nation v. Canada (Attorney General), 2021 BCCA 155

- Issues
  - Judge's Re-Opening of Issues of Infringement
    - Trial judge did not err in examining the issues of infringement, as the judge from the first phase did not consider which aspects of the regulatory regime infringed the Aboriginal right
  - Judge's Justification Analysis
    - Trial judge did not err, with 3 exceptions, in applying the justification analysis
    - 3 exceptions were largely based on the evidence at trial

Ahousaht Indian Band and Nation v. Canada (Attorney General), 2021 BCCA 155

- Significance
  - "One of the most complex [cases] that courts have had to deal with."
    - "[C]ourts are not institutionally competent to design and implement a complete regulatory scheme for managing fisheries. At best, they are capable of examining existing schemes and identifying particular deficiencies in them. **Where a clear path to remedying deficiencies is available**, courts can make remedial orders. In the more common situation **where the path to remedying deficiencies is not clear**, however, courts may be able to do no more than to identify the deficiencies, and to require the federal government to take appropriate remedial decisions to eliminate them."

Questions? We're Here to Help!

Thomas Isaac, Partner
tisaac@cassels.com

Jeremy Barretto, Partner
jbarretto@cassels.com

Arend J.A. Hoekstra, Associate
ahoekstra@cassels.com

Emilie N. Lahaie, Associate
elahaie@cassels.com

Grace Wu, Associate
gwu@cassels.com

Visit our Aboriginal Law page at https://cassels.com/expertise/aboriginal/

Cassels

Suite 2100, Scotia Plaza
40 King Street West
TORONTO, ON
M5H 3C2 Canada

t: 416 869 5300
f: 416 350 8877

Suite 2200, HSBC Building
885 West Georgia Street
VANCOUVER, BC
V6C 3E8 Canada

t: 604 691 6100
f: 604 691 6120

Suite 3810, Bankers Hall West
888 3rd Street SW
CALGARY, AB
T2P 5C5 Canada

t: 403 351 2920
f: 403 648 1151