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Aboriginal & Regulatory Law

2021 UPDATE

September 23, 2021

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Aboriginal Law & Regulatory Law: 2021 Update

September 23, 2021

- Upcoming Presentations
  - **Residential Schools Unmarked Gravesites (Emilie N. Lahaie)**
  - ***Hot Topics in Regulatory Law*** *(Jeremy Barretto & Viviana Berkman)*
  - ***Federal Legislation to Implement UNDRIP*** *(Grace Wu & Ryan R. Moore)*
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Residential Schools Unmarked Gravesites

ABORIGINAL LAW UPDATE

September 23, 2021

Emilie Lahaie

Graves Discovered

- Over about 140 years of operation at over 150 Indian Residential School locations, TRC research indicates that at least 3,213 children are reported to have died (still considered a conservative estimate)
- To date, more than 1300 suspected graves have been found across Canada
  - The vast majority of the former residential school sites haven't been searched — and no plans to search have been announced
- While some graves and cemeteries associated with the residential schools are known and are still maintained, others are now unknown or incompletely documented in the literature, and may even have passed from local memory

Graves Discovered

- Some searches that have been completed (with dates as announced):
  - May 27, 2021: the remains of 215 children were found at the site of the former Kamloops Indian Residential School in Kamloops, BC
  - June 2, 2021: Approximately 35 unmarked graves were found at the site of the former Regina Indian Industrial School near Regina, SK
  - June 22, 2021: approximately 35 unmarked graves were found at the site of the former Muscowequan Indian Residential School on the Muskowekwan First Nation, near Lestock, SK
  - June 24, 2021: 751 unmarked graves were found at the site of the former Marieval Indian Residential School in Cowessess, SK
  - June 30, 2021: 182 unmarked graves were found at the site of the former St. Eugene's Mission Residential School in Cranbrook, BC
  - July 13, 2021: over 160 unmarked graves were found at the site of the Kuper Island Indian Industrial School near Vancouver Island, BC
- Searches are planned or in progress at several former residential school locations across Canada
- Gravesites have also been found at similar schools in the US, also leading to calls to action.

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THE COMMISSION BELIEVES THAT ASSISTING FAMILIES TO LEARN THE FATE OF CHILDREN WHO DIED IN RESIDENTIAL SCHOOLS; LOCATING UNMARKED GRAVES; AND MAINTAINING, PROTECTING, AND COMMEMORATING RESIDENTIAL SCHOOL CEMETERIES ARE VITAL TO HEALING AND RECONCILIATION.

Summary of the Final Report of the Truth and Reconciliation Commission of Canada (2015)

Statement from the Truth and Reconciliation Committee in their 2015 Summary of the Final Report, associated with Call to Action 76.

Reactions

Indigenous Groups

- Continue to honour survivors of residential schools and children murdered by these schools through Orange Shirt Day
- Echo Calls to Action regarding the location and commemoration of unmarked Graves (searches, release of records, etc.)
- Call for criminal investigations
- Call for more government accountability

Provincial Government

- BC Government commit $12m to support First Nations with investigative work at former residential school Sites
- Ontario Government pledge $10m over three years to identify, investigate and commemorate residential school burial sites
- Both provinces express an intention for each phase to be guided by Indigenous communities

Federal Government

- Pledge to help preserve gravesites and search for unmarked burial grounds at other schools (committed $27m)
- Designate September 30 National Day for Truth and Reconciliation
- Special Interlocutor to work with Indigenous leaders and communities to improve laws, regulations, policies and practices; Including those surrounding unmarked graves at residential schools and responsibilities for protection

Lasting Legal Impacts

- Indigenous Nations and advocacy groups are leading continued efforts to gather information, raise awareness and seek justice. These efforts include:
  - further search efforts of the sites of former residential schools, with or without government support;
  - calls for all records related to the Indian Residential School System to be made widely available;
  - renewed calls for the Church to release documents and officially apologize to survivors of these Schools; and
  - calls for individuals still alive who participated in criminal acts within Residential Schools to be brought to justice.
- Under Article 8 of UNDRIP, Canada shall provide redress surrounding residential schools
  - Canada does not currently have the legal framework or tools to answer the calls for justice

Key Takeaways

- The discoveries of the IRS unmarked graves have brought to the greater awareness to the Canadian public about the legacy of the residential schools.
- In addition to the legal and governmental steps being taken, the public`s exposure to this news, and in turn the experiences of the Indigenous community in residential schools, has led to a more concrete understanding of what the “legacy of the residential schools” really means to Indigenous groups across the country.

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Hot Topics in Regulatory Law

ABORIGINAL & REGULATORY LAW: 2021 UPDATE

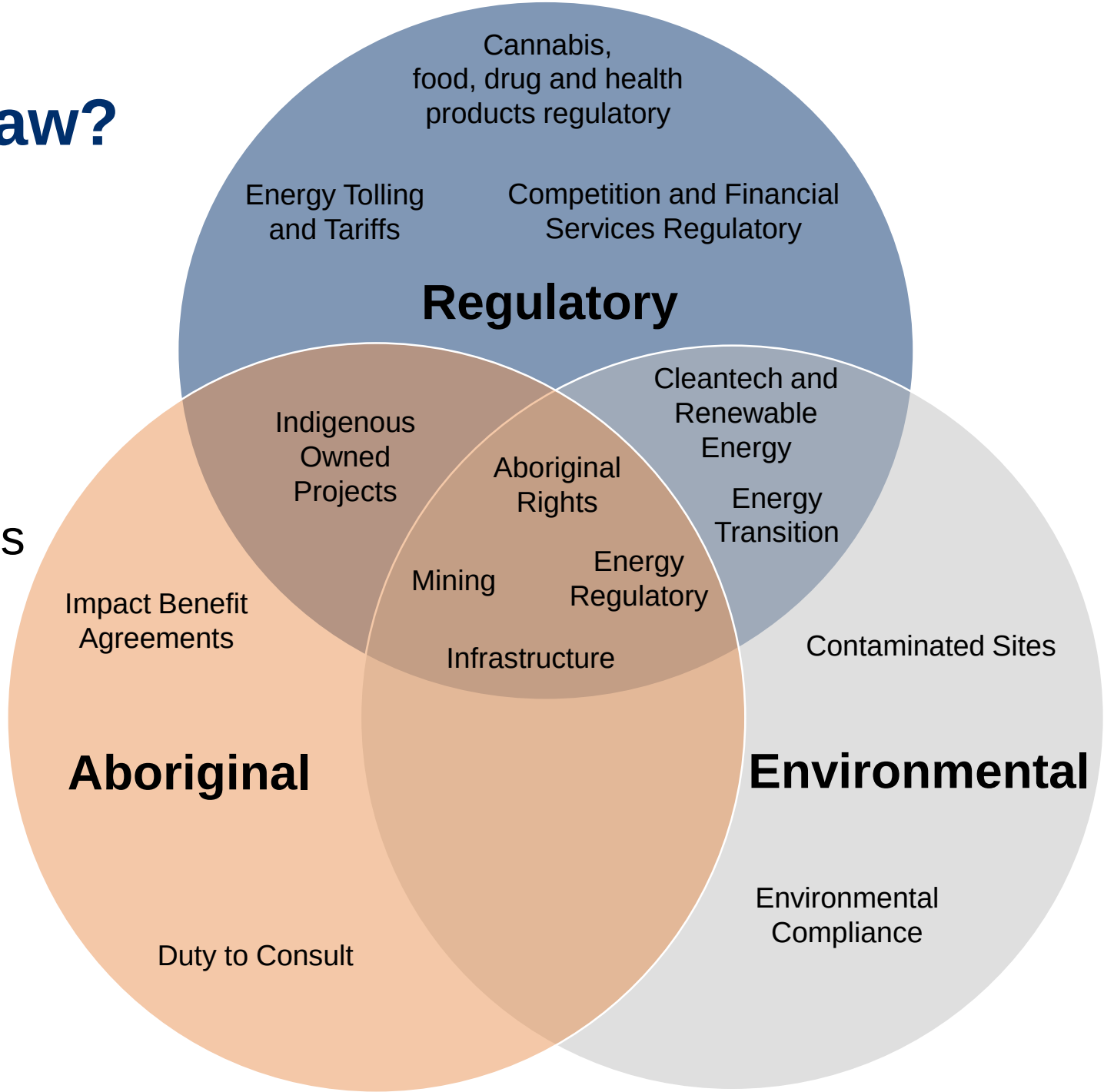
September 23, 2021

Jeremy Barretto

Viviana Berkman

What is Regulatory Law?

- Regulatory law typically involves some form of government approval
- Regulatory lawyers provide advice to clients with matters before agencies, boards, commissions, and tribunals with statutory jurisdiction
- Significant overlap with Aboriginal and Environmental Law



Hot Topics in Regulatory Law

1. Best Practices for Contractual Allocation of Environmental Liability
2. Standing and Participation in Regulatory Proceedings
3. Energy Transition in Canada
4. Indigenous Owned Projects

Best Practices for Contractual Allocation of Environmental Liability

- Parties to asset-based transactions often include environmental indemnification provisions in their agreement — these provisions aim to allocate the environmental liability risk amongst the parties
- *Resolute FP Canada Inc v Ontario (AG)*: SCC declined to enforce a broad indemnity because the factual matrix narrowed its scope
  - Key message: environmental indemnities should not be drafted in abstract

"Our Watch, Your Watch"

The Vendor shall indemnify the Purchaser against all Claims existing on the Closing Date or based upon underlying facts and circumstances occurring prior to the Closing Date.

"As is, where is"

The Purchaser expressly acknowledges and agrees that this indemnity shall include any claims resulting from or in connection with the Assets, regardless of date.

Standing and Participation in Regulatory Proceedings

- The directly and adversely affected test is commonly used in regulatory proceedings to request standing and participation
- The Alberta Court of Appeal decision, *Normtek Radiation Services Ltd v. Alberta Environmental Appeal Board*, 2020 ABCA 456 ("***Normtek***"), is considered in the Alberta Energy Regulator (the "**AER**") proceedings
  - Post *Normtek*, the AER is continuing to consider similar statutes, such as the *Environmental Protection and Enhancement Act*, in its interpretation of "directly and adversely affected"
- AER tends to require a high standard of proof of potential or reasonable probability of harm where the "direct" or "adverse" impacts are tenuous
  - The deciding factor is not the type of adverse effect alleged, but whether a party has presented sufficient evidence to prove it
  - Participatory decisions are a fact-specific determination
- Lessons on participation and stakeholder engagement drawn from remote regulatory hearings in 2020/2021

Energy Transition in Canada

- Corporate Power Purchase Agreements for Renewable Energy
- Hydrogen developments in Canada
  - Hydrogen Strategy for Canada
    - Goal is to unlock Canada's full hydrogen potential by 2050
    - Canada is predicted to be a top 3 global producer of hydrogen
    - Existing O&G infrastructure can be leveraged
- Carbon capture, utilization and storage ("**CCUS**")
  - CO2 emissions generated in hydrogen production are captured and permanently sequestered in underground formations
- Renewable natural gas ("**RNG**") or Biomethane
  - Biogas is generated from the anaerobic digestion of organic material from animals and plants and refined to create pipeline-grade RNG
- Geothermal Energy
  - Heat from underground reservoirs is used to generate electricity at surface

Indigenous Owned Projects

- Trend of Indigenous equity ownership of resource development projects
- Recent examples include:
  - Cascade Power Project
  - Suncor Energy Inc. East Tank Farm Development
  - Fort McMurray West 500kV Transmission Project
  - Indigenous communities seeking to purchase the Trans Mountain Pipeline
- Regulatory, tax, and corporate considerations

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Federal Legislation to Implement UNDRIP

ABORIGINAL & REGULATORY LAW: 2021 UPDATE

September 23, 2021

Grace Wu

Ryan R. Moore

Overview of Canada's Legal Regime

- Internationally, Canada is the leading protector of Indigenous rights
- Thanks to the efforts of Indigenous leaders, lawyers, and the courts that took a purposive approach to section 35, *Constitution Act, 1982*, Canada has the most sophisticated legal regime in the world for protecting Indigenous rights
  - The Supreme Court of Canada has released 70+ decisions on section 35, *Constitution Act, 1982* alone
- Canada has the most robust system of any country to prevent unilateral state action against Indigenous peoples
- Although not perfect, Canada is well on its way to real and lasting reconciliation
- To date, no country has implemented UNDRIP as a whole

Overview of UNDRIP

- UN Declaration on the Rights of Indigenous Peoples ("**UNDRIP**") is an international, aspirational document that is not legally binding — instead, it serves as a guide in the review of a country's human rights performance in respect of Indigenous peoples
- UNDRIP consists of 24 preambular statements and 46 articles, which delineate individual and collective Indigenous rights, including those pertaining to (among other things):
  - Culture;
  - Lands, territories, and resources; and
  - Principle of free, prior, and informed consent

Canada's Enactment of the *UNDRIP Act*

- 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
- On June 21, 2021, Canada passed Bill C-15 and enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act (UNDRIP Act)*

Content of the *UNDRIP Act*

- The purposes of the *UNDRIP Act* are to:
  - Affirm UNDRIP as a universal international human rights instrument with application in Canadian law; and
  - Provide a framework for Canada's implementation of UNDRIP
- In short, the *UNDRIP Act* requires Canada to ensure all Canadian laws are "consistent with" UNDRIP, through consultation and cooperation with the Indigenous peoples in the country
- The *UNDRIP Act* is a simple and broadly phrased legislation, with little detail regarding the contingencies, priorities, and timelines associated with the obligations contained therein

Preamble of the *UNDRIP Act*

- "[M]easures to implement [UNDRIP] in Canada must **take into account the diversity of Indigenous peoples** and, in particular, the diversity of the identities, cultures, languages, customs, practices, rights and legal traditions of First Nations, Inuit and the Métis and of their institutions and governance structures, their relationships to the land and Indigenous knowledge."
  - In Canada, there are more than 630 First Nation communities, the Inuit, and the Métis
  - The *UNDRIP Act* does not contemplate and explain how Canada will adapt when conflicts between the diverse Indigenous groups inevitably arise in respect of implementing UNDRIP

Section 5 of the *UNDRIP Act*

- "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]."
  - "Cooperation" means to work together to the same end (Canadian Oxford Dictionary)
    - It is particularly difficult to read the Preamble and section 5 of the *UNDRIP Act* together — i.e., "diversity of Indigenous peoples" + "all measures necessary"
  - The *UNDRIP Act* imposes a very high and broad standard of "all measures necessary" without establishing any reasonable limits on these "measures"
  - "Laws" means all Canadian legislations and regulations

Section 6(1) of the *UNDRIP Act*

- "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]**."
  - UNDRIP does not contain explicit "objectives," and it does not contain any explicit "aims," "goals," or "intentions"
  - UNDRIP consists of 24 preambular statements and 46 articles, most of which are deliberately blunt and broad
  - UNDRIP uses language that is inconsistent, and often incompatible, with the language and principles emanating from Canada's constitutional framework, including from the 70+ Supreme Court of Canada decisions on section 35, *Constitution Act, 1982*

Big Picture: Reconciliation

- Canada's overarching goal with the *UNDRIP Act* is to advance its work on reconciliation
- Reconciliation is more than platitudes and recognition — if not grounded in practical actions, the term "reconciliation" is merely rhetoric
- UNDRIP was not designed as a specific legal instrument to be directly implemented as law
  - There will inevitably be incompatibilities that can only be addressed by a **specific, nuanced, and flexible** piece of legislation
- Any discussion of reconciliation, including UNDRIP, demands truthful, thoughtful, and honourable dialogue and action

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Judicial Review in Aboriginal and Regulatory Law

OVERVIEW AND TRENDS

September 23, 2021

Danielle DiPardo

Aaron Cressman

Overview: Application of Judicial Review

- "The purpose of judicial review (JR) is to ensure the legality of state decision making" — *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26, para 13 [*Highwood*]
- JR can only apply to decisions of entities with state-delegated decision-making power, regardless of whether the decision has a public dimension
  - JR is not available for the decisions of private organizations or voluntary associations (*Chartier v Métis Nation — Saskatchewan*, 2021 SKQB 142 [*Chartier*])
- Can review the state's decisions on the basis of procedural fairness or on substance

Overview: Procedural Fairness and Substantive Review

- Standard of review for challenging a decision on substance is now reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, para 10 [*Vavilov*])
  - Exceptions where clearly indicated by legislative intent or required by rule of law
- Standard of review for challenging a decision on procedural fairness is correctness/fairness (*RNL Investments Ltd v British Columbia (Agricultural Land Commission)*, 2021 BCCA 67, para 57)
- Procedural fairness is required in every decision, but level of fairness will depend on context (*Cardinal v Kent Institution* [1985] 2 SCR 643)
  - Level of procedural fairness required is determined by factors set out in *Baker v Canada (Minister of Citizenship)*, 1999 SCC 699, paras. 22–28:
    - Nature of the decision;
    - Nature of statutory scheme;
    - Importance of the decision to individuals affected;
    - Legitimate expectations of the party affected; and,
    - Nature of the deference accorded to the decision-making body

Overview: Jurisdiction & Procedure

- Jurisdiction depends on the authority being challenged:
  - Decisions made under authority of provincial statutes heard by appropriate provincial court
  - Decisions of bodies exercising authority delegated under federal statutes heard by a federal court
- Procedure will depend on jurisdiction
  - Limitation period for federal decisions is 30 days (Section 18.1(2) of the *Federal Courts Act*), varies across provinces
  - Applications must include the order or decision being challenged and the reasons for this decision

Recent Trends

- Reasonableness is now the only standard for substantive review (*Vavilov*)
- JR no longer available for private organizations (*Highwood*)
  - Chartier (2021), *Beaucage v Metis Nation of Ontario*, 2019 ONSC 633, *Quewezance v Federation of Sovereign Indigenous Nations*, 2018 SKQB 313; compared to *Metis Nation — Saskatchewan v Morin*, 2014 SKQB 421
- Industry dependent on regulatory approval still vulnerable to challenges (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153)
  - Even where successful, time to complete JR process is significant.
  - Significant uncertainty for proponents during JR process.

Caselaw: *Wet'suwet'en Treaty Office Society v British Columbia (Environmental Assessment Office)*, 2021 BCSC 717

- Wet'suwet'en Treaty Office Society (OW) challenged decision granting extension of Environmental Assessment Certificate for Costal Gaslink Pipeline Ltd. (CGL) on procedural fairness and substantive grounds
  - OW stated that the decision did not include reasons and that the decision failed to consider (1) CGL's compliance record and (2) the Report of National Inquiry into Missing and Murdered Indigenous Women and Girls (Inquiry Report)
- Looked at procedural fairness owed in context to determine whether written reasons were required or could be inferred
- Considered mitigation measures put forward by CGL prior to the Inquiry Report
  - Adaptive management practices seen as flexible and broad mitigation measures addressed socio-economic issues raised in Inquiry Report

Caselaw: *Chartier v Métis Nation — Saskatchewan*, 2021 SKQB 142

- Applicant claimed internal MN-S legislation violated MN-S Constitution and was passed in procedurally unfair circumstances
- MN-S not created by federal or provincial statute, no Canadian statutory authority to govern or pass legislation
  - Had entered Métis Government Recognition and Self-Government Agreement, June 27, 2019
- Court found that MN-S was a voluntary organization, no state decision making so JR did not apply (relied on SCC decision in *Highwood*)
- Differs from cases where a band derives its powers from federal statute
  - See: *Morin v Enoch Cree First Nation*, 2020 FC 696, *Gadwa v Kehewin First Nation*, 2016 FC 597

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The Crown's Duty to Consult

UPDATE

September 23, 2021

Arend J.A. Hoekstra

Overview

- *Ginoogaming First Nation v Her Majesty The Queen in Right of Ontario*, 2021 ONSC 5866
- *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758
- *Yahey v British Columbia*, 2021 BCSC 1287
- Takeaways

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THE ALLEGED DUTY TO CONSULT AND ACCOMMODATE BY ITS VERY NATURE ENTAILS BALANCING [INTERESTS]... AND THUS LIES CLOSER TO THE AIM OF RECONCILIATION AT THE HEART OF CROWN-ABORIGINAL RELATIONS

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 14

Ginoogaming FN…, 2021 ONSC 5866

- Facts:
  - Proponent held mining claims for decades on Ginoogaming FN's traditional territory
  - Crown issued early exploration permit to proponent in 2019
  - Ginoogaming FN brought application for interim injunction on the basis that the Crown failed its duty to consult with Ginoogaming FN in issuing the permit
  - Court granted the injunction and noted that proponent had engaged with Ginoogaming FN as early as 2011, but the Crown had not delegated its duty to consult to the proponent
- Duty to consult principles:
  - Crown consultation must consider "cultural context of the engaged Indigenous form of consultation"
    - For Ginoogaming, silence doesn't mean agreement or indifference — it is not the Anishinaabe way to contradict people and it is important to listen
  - Funding may be necessary
    - Funding was available for coordinators, but not to hire experts necessary to pinpoint burial sites
  - Unilateral time constraints on consultation (imposition of deadlines)

Ginoogaming FN

- Test for Injunctive Relief (*RJR MacDonald*)
- Is there a serious question to be tried?
  - Contextual matter of meaningful consultation:
    - Cultural factors (e.g., silence not meaning agreement) pointed to possibility of no meaningful consultation
    - Unilaterally imposed deadlines on Ginoogaming FN
    - No capacity funding for technical experts
- Would the party seeking injunction suffer irreparable harm?
  - Absolute certainty not required when dealing with Aboriginal rights
  - "Activity that restricts a First Nation's ability to exercise its Aboriginal and/or treaty rights in and of itself can constitute irreparable harm"
- Does the balance of convenience favour the applicant?
  - Little evidence of harm to proponent beyond a "bald statement" of financial status
  - Proponent held mining claims to land in question for decades, but had not attempted to develop them until recently

Ginoogaming FN

- Strategic considerations:
  - Funding
  - Communication & timelines
  - Defending an action for an interlocutory injunction

Ermineskin Cree Nation v Canada…, 2021 FC 758

- Facts:
  - Ermineskin is party to Treaty 6 with Canada
  - Proponent operated a mine on Ermineskin's traditional territory — party to an impact benefit agreement ("**IBA**") in respect of the mine
  - Proponent sought in 2019 to expand the mine ("**Phase II**")
  - Crown conducted a designation review process for Phase II under the *Impact Assessment Act* (Canada), but did not designate Phase II
    - Sought input from 30+ First Nations
  - Ermineskin entered into an IBA in 2019 providing economic, community and social benefits in exchange for Phase II's impacts on Ermineskin's Aboriginal and treaty rights
  - Crown re-considered and designated Phase II in 2020 upon request of two First Nations
    - Sought input only from the two First Nations
  - Ermineskin sought judicial review of the designation
- Court found that the Crown did not meet the duty to consult with Ermineskin, as it did not consult whatsoever

Ermineskin: Duty to Consult

- Court held that an IBA represents economic or community benefits "closely related or, or derivative from," existing Aboriginal or treaty rights
- Duty to consult is triggered when the Crown has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely impact it
- Duty was triggered:
  - "Rights that are closely related to and derivative from Aboriginal rights are protected by the duty to consult which of course flows from the constitutionalized doctrine of the honour of the Crown"
  - "Jurisprudence now extends the duty to consult to include economic rights and benefits closely related to and derivative from Aboriginal rights"
  - Designating the Project would adversely impact *Ermineskin*:
    - Delayed benefits accruing from the IBA due to extended process upon designation
    - Adverse impact on *Ermineskin*'s economic rights closely related to, or derivative from, existing rights

Ermineskin: Duty to Consult

- Strategic considerations:
  - Not closing the door to consultation (“we won’t talk about x”)
  - Potential additional benefits of IBAs for proponents
  - Potential inclusion of IBAs (signed and unsigned) as a topic for consultation (breach of IBA, etc.)
  - Highlighting role of the Crown to balance — not simply add additional processes

Yahey v British Columbia, 2021 BCSC 1287

- Court found that cumulative effects of industrial development in BC infringed on the treaty rights of Blueberry River First Nation ("**Blueberry**") on Treaty 6 territory in northeastern BC
  - Province argued that Blueberry was adequately consulted as part regulatory decision-making processes
- Court found that Province had notice of Blueberry's concerns for at least a decade, but failed to adequately assess or consider the cumulative effects of development on Aboriginal and treaty rights
  - "Piece-meal project-by-project approach to consultation will not address Blueberry's concerns"

Takeaways

1. Cultural context matters in satisfying the duty to consult
2. Aboriginal groups must have the ability and capacity to meaningfully engage
3. Economic rights “closely related or, or derivative from,” existing Aboriginal or treaty rights may trigger the duty to consult
4. Piecemeal consultation may be inadequate to accurately assess the impact on Aboriginal or treaty rights

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Current Issues and Trends in Aboriginal Title Litigation

LITIGATION UPDATE

September 23, 2021

Mary I.A. Buttery, Q.C.

Jared Enns

Introduction

- The landscape of Aboriginal title litigation has changed dramatically since the decision in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44
- In *Tsilhqot'in*, declaration was only sought in respect of Crown lands
- What are the incidents of Aboriginal title?
- Certain interests are capable of justifying an incursion on Aboriginal title
- Unresolved issue in Aboriginal law: is a certificate of indefeasible title subject to an Aboriginal title claim?

Aboriginal Title Litigation to Watch

- This issue arises in at least three current claims that are being litigated in British Columbia:
  - Kwiketlem First Nation
  - Cowichan Tribes
  - The Council of the Haida First Nation

Defences to Aboriginal Title Claim

- On February 9, 2016, the Kwikwetlem First Nation ("**KFN**") commenced a claim asserting Aboriginal title both Provincial Crown land and various parcels in fee simple title
- In respect of the parcels held in fee simple title, KFN is seeking a declaration that any grant, patent, or certificate of indefeasible title held in respect of any of the lands in the "claim area" either be:
  - Cancelled; or
  - Transferred to KFN
- Cassels has been retained by one of the title holders to defend this claim

Defences to Aboriginal Title Claim

- We have raised the following defences on behalf our client:
  - Fee simple title is inconsistent with Aboriginal title;
  - The granting of fee simple title extinguished Aboriginal title; and
  - The granting of fee simple title displaced Aboriginal title
- Similar defences have been raised on behalf of the other defendants
- Novel defences raised in the context of unresolved legal issues

Defences to Aboriginal Title Claim

- On March 5–7, 2018, KFN brought an application to strike these defences
- The application was dismissed:
  - There was no binding authority that had squarely addressed the intersection between Aboriginal title and fee simple title;
  - It was not plain and obvious that the defences were certain to fail;
  - An innocent third-party is entitled to plead extinguishment; and
  - An attempt to resolve issues of such significance through an application to strike would be inappropriate
- Takeaway: private land owners can argue extinguishment

Discovery Issues and Historical Matters

Kwikwetlem First Nation v British Columbia, 2021 BCSC 978

[24] In my view, interrogatories or, indeed, questions on examinations for discovery should no longer be considered by British Columbia courts to be improper solely because they seek answers that delve into history and go beyond the living memories of the respondents. That is neither a practical nor pragmatic approach to the effective resolution of these disputes. What is determinative is whether the questions (a) attempt to elicit historical facts or simple self-evident conclusions that would necessarily be reached as a matter of course by any ordinary person, or (b) attempt to elicit an opinion resulting from an analysis of those historical facts and self-evident conclusions, or (c) an involved or remote conclusion requiring special or detailed consideration or analysis of certain facts and with which every ordinary person may not agree. The first of those examples is permissible. The second and third are not.

Who are the Necessary Parties?

- Who are the necessary parties in Aboriginal title litigation?
- *Giesbrecht v British Columbia (Attorney General)*, 2020 BCSC 174
  - Application by the Province of British Columbia to add the Attorney General of Canada as a party
  - Application dismissed:
    - All of the issues can be adjudicated with the involvement of the existing defendants;
    - The Province is fully capable of defending this action;
    - Reconciliation requires litigating in the most cost effective and timely way possible; and
    - Canada's participation was determined to be unnecessary to ensure that all matters that have been put in issue by KFN will be effectually adjudicated
- This decision was upheld on appeal [*Kwikwetlem First Nation v British Columbia (Attorney General)*, 2021 BCCA 311]

Framing the Issues

- In the context of Aboriginal title litigation, reconciliation requires the consideration of any intervening rights of innocent third parties:
  - *Chippewas of Sarnia Band v Canada (Attorney General)*, 2000 CanLII 16991 (ONCA)
  - *Skeetchestn Indian Band and Secewepmec Aboriginal Nation v Registrar of Land Titles, Kamloops*, 2000 BCCA 525
  - See also:
    - *Delgamuukw v British Columbia*, [1997] 3 SCR 1010
    - *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73
    - *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44

Expert Witnesses

- Experts play an essential role in Aboriginal title litigation:
  - Necessary to help the court understand and interpret the historical landscape where there are no surviving eye-witnesses;
  - Assist in framing the issues, the objective of which is reconciliation; and
  - Necessary because “the court must understand the colonization forces in order to contextualize the [Band’s] use and occupation of lands in British Columbia”
- Understanding the historical context is essential to balancing rights, which may include intervening rights of innocent third parties

Conclusion

- One of the key, unresolved issues in Aboriginal law is the intersection between Aboriginal title and fee simple title
- Consideration in these cases must be given to:
  - The nature of and necessary parties to the litigation;
  - Intervening rights and a balancing of the equities;
  - The honour of the Crown and reconciliation, including as it relates to the intervening rights of innocent third-parties;
  - Historical matters, and whether the historical issues in a particular case fall within the purview of experts or lay witnesses; and
  - The role that experts play in contextualizing and balancing the rights at stake

Aboriginal & Regulatory Law: 2021 Update

September 23, 2021

- Upcoming Presentations
  - ***Residential Schools Unmarked Gravesites*** *(Emilie N. Lahaie)*
  - ***Hot Topics in Regulatory Law*** *(Jeremy Barretto & Viviana Berkman)*
  - ***Federal Legislation to Implement UNDRIP*** *(Grace Wu & Ryan R. Moore)*
  - ***Judicial Review in Regulatory and Aboriginal Law*** *(Danielle DiPardo & Aaron Cressman)*
  - ***The Crown's Duty to Consult*** *(Arend J.A. Hoekstra)*
  - ***Current Issues and Trends in Aboriginal Title Litigation*** *(Mary I.A. Buttery, Q.C. & Jared Enns)*
  - **Current Issues and Trends in Aboriginal Law** (Tom Isaac & Sandra Gogal)

Please contact us at lcyprus@cassels.com if you have any questions.

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Current Issues and Trends in Aboriginal Law

UPDATE

September 23, 2021

Thomas Isaac

Sandra Gogal

Trends — Lack of Sustainable Public Policy Framework

- Single largest area of our practice
  - Assisting governments, industry/business or Indigenous peoples on addressing the palpable lack of a sustainable public policy regime in Canada dealing with Section 35 rights and the Crown's duty to consult Aboriginal peoples
- Governments doing too little — e.g., Saskatchewan and Manitoba
- Governments acting without a sustainable plan — e.g., British Columbia
- Governments not acting with a legal strategy that furthers reconciliation — e.g., British Columbia, *Yahey v.* BC 1287, Aboriginal title & fee simple property rights, etc.
- Rhetorical exercises — land acknowledgements involving recognition of title, UNDRIP
- Mismatched objectives: long term v. short term — long term requirements of real and lasting reconciliation v. election-cycle public policy and related decisions — there is a fundamental chasm between the two
- Prognosis — this is just the beginning…

Trends — More uncertainty for Proponents

- Cumulative effects: notwithstanding lack of regulatory consistency (provincial and federal), proponents need to assess business and legal risk of not assessing cumulative impacts of its project in the context of assessing impacts on Aboriginal interests
- Recognition of Economic Interests as part of Aboriginal rights casts doubt on whether IBAs are purely commercial in nature — classifying financial payments as a commercial benefit (social license) or compensation for impacts may dictate whether proponent and Aboriginal interests align
- Indigenous Knowledge and participation is arguably a critical component of any ESG objective in project development
- Given lack of regulatory guidance, industry must take the lead on defining FPIC in the context of it's community engagement

Questions? We're Here to Help!

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