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Aboriginal Law Update

The *Mikisew Cree* Decision: Balancing Government's Power to Manage Lands and Resources with Consultation Obligations under Historic Treaties

On November 24, 2005, the Supreme Court of Canada handed down its decision in the case of *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.[1] In the decision, the Supreme Court confirmed that, while governments have the power under treaties to authorize land uses which infringe on treaty rights, the exercise of that power imposes on governments a duty to consult where the taking up of land adversely affects those rights.

Background

The case arose out of a proposal to re-establish a winter road through Wood Buffalo National Park for winter access from four communities in the Northwest Territories to the highway system in Alberta. The Mikisew Cree First Nation, a Treaty 8 signatory based in Fort Chipewyan, Alberta, objected to the proposed road on the grounds that it would infringe on their hunting and trapping rights under Treaty 8. The First Nation challenged the decision of the Minister of Canadian Heritage, the Minister responsible for Parks Canada, to authorize the construction of the road on the grounds that the Minister had not adequately consulted the First Nation about the road. Parks Canada had provided a standard information package about the road to the First Nation, and the First Nation was invited to informational open houses along with the general public. Parks Canada did not consult directly with the First Nation about the road, or about means of mitigating impacts of the road on treaty rights, until after important routing decisions had been made. The First Nation's challenge was successful at trial, but on appeal the Federal Court of Appeal held, in a 2-1 split decision, that no Crown consultation obligation was triggered by the approval of the winter road.

Treaty 8 confirms the right to hunt, trap and fish for members of First Nations that signed the Treaty. However, those rights are subject to an important geographic limitation: they do not apply on lands which are "required or taken up from time to time for settlement,

[1] 2005 SCC 69.

mining, lumbering, trading and other purposes". In its 1996 decision in the *Badger* case,[2] the Supreme Court of Canada held that this "taking up" provision means that hunting rights under Treaty 8 may not be exercised on lands that are put to a "visible, incompatible land use". Subsequent to that decision, different interpretations had been given by appellate courts to the Crown's obligation to consult when taking up lands under this provision of the treaty.

According to the majority of the Federal Court of Appeal in this case, the treaty right to hunt and trap was itself subject to the government's ability to take up land for roads and other purposes. As the right to hunt and trap did not apply on lands taken up for roads and other purposes, the Crown's duty to consult was not triggered by the taking up.

The Supreme Court of Canada's Decision

Consistent with other recent Supreme Court of Canada decisions which have emphasized the need for ongoing reconciliation of aboriginal interests into government decision-making, the Supreme Court overturned the Federal Court of Appeal's decision, and crafted a decision that balances governments' need to manage lands and resources in the broader public interest with proper consideration of impacts on treaty rights in governments' decision-making processes. The Supreme Court found that, because the taking up adversely affected the First Nation's treaty right to hunt and trap, Parks Canada was required to consult with the Mikisew Cree before making its decision. As Parks Canada had failed to do so, the Supreme Court set aside the Minister's approval of the winter road, and sent the matter back to the Minister for reconsideration in accordance with the decision.

Power to Take Up Land Confirmed

The first point in the decision, and perhaps the most fundamental, is the Supreme Court's recognition that the purpose of Treaty 8 and other post-Confederation treaties was to open up lands in Canada for settlement and development. The treaties were not a guarantee to First Nations that their hunting, trapping and fishing activities would remain as they were in 1899. Rather, the treaties put First Nations on notice that lands would be taken up over time for other uses.

While Treaty 8 lists a number of purposes for which lands may be taken up by governments, the Supreme Court emphasized that this list — "settlement, mining, lumbering, trading or other purposes" — should not be read restrictively. This is important for resource activities such as oil and gas development, which are not included in the list of purposes but which are very important purposes for which lands are taken up for development today.

[2] [1996] 1 S.C.R. 771.

In the *Badger* decision, the Supreme Court had held that Treaty 8 hunting rights were circumscribed by geographic limits and by specific forms of government regulation. In *Mikisew Cree*, the Supreme Court held that Treaty 8 rights are further limited by the Crown's right to take up lands, subject to the consultation obligations set out in the decision.

Honour of Crown Requires Consultation Where Taking Up Infringes Treaty Rights

The Supreme Court recognized that there is an "uneasy tension" between governments' power to take up lands under treaties and the treaties' promises of continued hunting, trapping and fishing. To balance governments' powers against the need to protect treaty rights, the Court stated that, while the right to hunt and trap under the treaties is limited by the governments' power to take up lands, in exercising that power governments must inform themselves of the potential impact of that taking up on the exercise of treaty rights. Where treaty rights are infringed, a government must discharge its obligation to consult and, if appropriate, accommodate First Nations' interests *before* reducing the geographic area over which treaty rights may be exercised. The Court held that Treaty 8 confers on the Mikisew Cree substantive rights (hunting, trapping, and fishing) along with the procedural right to be consulted about infringements of the substantive rights.

Not Every Taking Up of Land is an Infringement

At the same time, the Court held that not every taking up of land under the treaty will trigger the Crown's duty to consult. The Court rejected conclusions of other courts[3] that *any* taking up of land would constitute an infringement of treaty rights. However, the Court indicated that a low threshold would apply to trigger Crown consultation obligations, consistent with the standards set out in the *Haida Nation*[4] and *Taku River Tlingit*[5] decisions. Governments are required to consult before taking up land where that taking up "might adversely affect" the exercise of treaty rights. Given that a taking up of land by definition removes that land from the exercise of treaty rights, it is difficult to envision circumstances where the duty to consult would not be triggered. In this case, the Court held that the taking up of land for the construction of the winter road would adversely affect the treaty hunting and trapping rights of the Mikisew Cree.

Sliding Scale for Content of Consultation Obligation

While a low threshold applies to trigger Crown consultation obligations, the degree of consultation and, in some cases, accommodation required will depend on the degree to

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[3] *Halfway River First Nation v. British Columbia (Minister of Forests)* (1999), 178 D.L.R. (4th) 666 (B.C. C.A.).
[4] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.
[5] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.

which the taking up of land will affect treaty rights. The Court noted that the same sliding scale of consultation obligations applied in a treaty context as in a non-treaty context, stating that "adverse impact is a matter of degree, as is the extent of the Crown's duty" to consult.[6] In this case, the Court held that, while the winter road would affect Mikisew Cree treaty hunting and trapping rights, this was a fairly minor road that was built on lands surrendered by the Mikisew Cree when they signed Treaty 8. As a result, the lower end of the consultation spectrum was engaged. This meant Parks Canada should have provided notice to the Mikisew Cree, and should have engaged them directly to solicit their views and to attempt to minimize adverse impacts on their rights. As Parks Canada had unilaterally determined important matters like road alignment before meeting with the Mikisew Cree, the Court held that the Crown's duty to consult had not been adequately discharged.

Consistent with its *Haida Nation* and *Taku River Tlingit* decisions, the Supreme Court held that there is a reciprocal onus on the Mikisew Cree to carry their end of the consultation process by making their concerns known, responding to governments' attempts to address concerns and suggestions, and trying to reach a mutually satisfactory solution. The Court emphasized that the Mikisew Cree did not have a veto over the alignment of the road, and noted that consultation efforts would not always lead to agreement on appropriate accommodation measures to address their concerns.

Crown Obligation to Consult Tied to Traditional Lands

The decision also helped to clarify an important area of uncertainty about the geographic scope of the Crown's duty to consult in a treaty context. Treaty hunting rights can be exercised by members of signatory First Nations throughout the area covered by the treaty. In the prairie provinces, the geographic scope of hunting rights was extended to apply throughout each province by the Natural Resources Transfer Agreement. Theoretically speaking, therefore, land use decisions in southern Alberta could affect the exercise of treaty rights by the Mikisew Cree.

However, in *Mikisew Cree*, the Supreme Court held that the duty to consult under Treaty 8 does not mean that "whenever a government proposes to do anything in the Treaty 8 surrendered area it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact".[7] The Court indicated that treaty rights to hunt are not determined on a treaty-wide basis, but rather on the basis of the lands over which the First Nation traditionally hunted, fished and trapped and continues to do so today. This suggests that the Crown's duty to consult First Nations is tied to activities only within lands traditionally and currently used by First Nations for treaty harvesting rights, and, more

[6] At ¶ 55.
[7] At ¶ 55.

importantly, that the Crown is not required to consult with a First Nation about activities located outside those lands.

Risks of Inadequate Consultation Underscored

Finally, the *Mikisew Cree* decision underscores the potential consequences for a project proponent where the Crown fails to discharge its duty to consult. In this case, even though the road at issue would have only minor impacts on treaty rights — the decision characterizes it as a "fairly minor winter road located on surrendered lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation"[8] of Treaty 8 — and even though the Court held that the Crown's duty to consult lay at the lower end of the consultation spectrum, the Court nevertheless set aside the Minister's decision to approve the winter road and sent the matter back to the Minister for reconsideration in accordance with the decision.

Implications

While the Mikisew Cree were the successful party in the appeal, it is likely that the decision will not have significant practical implications. The federal and provincial governments have been gearing up for consultation activities with treaty First Nations in anticipation of this decision. The decision's balancing of governments' power to manage lands and resources with protection of treaty hunting, fishing and trapping rights is consistent with the theme of prior Supreme Court decisions emphasizing the need for reconciliation of aboriginal interests with the broader public interest. The decision will provide further impetus for the federal and provincial governments to develop and implement appropriate processes for Crown consultations with aboriginal groups affected by governmental land and resource use decision-making. As the Court noted, "consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation."[9]

[8] At ¶ 64.
[9] At ¶ 63.

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