WILLMS & SHIER ENVIRONMENTAL LAWYERS LLP

Report

ENVIRONMENT • ABORIGINAL • ENERGY

Special Report: Aboriginal
April 2013

Landmark Keewatin ruling overturned

On March 18, 2013, the Ontario Court of Appeal overturned a Superior Court decision that had required the province to obtain federal approval before granting timber permits in the Keewatin lands of northwestern Ontario. In *Keewatin v. Ontario (Natural Resources),* the Appeal Court confirmed the role of the province in Aboriginal consultation and concluded that involving the federal government in areas of provincial jurisdiction would be "complicated, awkward and likely unworkable."

This case will have implications for the evolving area of 'duty to consult' and environmental impact assessment. Successful resource developers in Canada are aware of the Crown obligations triggered by their permit applications, and are engaging and negotiating impact benefit agreements with impacted First Nations when planning projects. It is likely that the decision will be appealed to the Supreme Court of Canada,

In authorizing any land use that may adversely affect harvesting rights in traditional territories, the province is constitutionally required to consult with the

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Canadian Council for Aboriginal Business Roundtable on New *Mining Act*

Willms & Shier Environmental Lawyers LLP is sponsoring this panel discussion on recent amendments to the *Mining Act*. As of April 1, 2013, exploration companies are required to consult with Aboriginal communities prior to conducting exploration work. (See page 7.)

Panelists will include Grand Chief Harvey Yesno; Bill Shepherd, Logistics and Procurement Manager, Fortune Minerals; JP Gladu, President and CEO, Canadian Council for Aboriginal Business; and Katherine Koostachin and Juli Abouchar of Willms & Shier.

This topic has special significance for Ontario's Ring of Fire, where exploration companies and First Nations and Métis people are negotiating economic opportunities in addition to measures to protect cultural sites and the natural environment.

CCAB will host the panel discussion on May 29th in Toronto. If you are interested in participating, contact CCAB. See http://www.ccab.com/

Special Report on Aboriginal Law ...

affected First Nations and, where appropriate, accommodate their treaty mandated harvesting rights.

Back in 1997, the Ontario Ministry of Natural Resources had issued a sustainable forest licence to Abitibi-Consolidated Inc. (since renamed Resolute FP Canada Inc.) to carry out clear-cut forestry operations in certain parts of the Whiskey Jack Forest. These lands fall within the Keewatin portion of the Treaty 3 territory, a 55,000-square mile tract of land in northwestern Ontario and eastern Manitoba. According to the treaty's "harvesting clause," the Ojibway retain the right "to pursue their avocations of hunting and fishing throughout the tract surrendered" except on tracts "required or taken up for settlement, mining, lumbering or other purposes by [the] Government of the Dominion of Canada."

The Grassy Narrows First Nation had opposed the timber license and, after an extended trial, the Ontario Superior Court ruled that the province could not "take up" land for forestry in the Keewatin Lands if such activity would substantially interfere with First Nations harvesting rights without first obtaining federal approval. "The Ojibway are entitled to exercise their Harvesting Rights unless Canada has authorized their limitation or extinguishment," Justice Sanderson wrote in her decision. She called for a "two-step" process entailing both federal and provincial input and control over logging and mining permits on the Grassy Narrows traditional territory.

The Appeal Court found that the Treaty partner is the Crown (not Canada) and that the treaty promises were made by the Crown not by any particular level of government. The Court rejected what it referred to as the trial judge's literal approach to treaty interpretation. The Appeal Court held that the Crown must fulfill Treaty promises within the framework of the division of powers under the Constitution.

The Appeal Court concluded that the trial judge's interpretation is unworkable:

> [T]he trial judge's interpretation produces a process that is unnecessary, complicated, awkward and likely unworkable. The two-step process is unnecessary to protect the Aboriginal Treaty harvesting right because when the Crown, through Ontario, takes up land, it must respect the Treaty right. … It is difficult to see how the process of consultation, which is required when the Treaty harvesting right is affected by taking up, would be improved by involving both levels of government.

The Appeal Court said that the trial judge's conclusion that Canada retains a role in Ontario's land use decisions could undermine, rather than advance, reconciliation. Eliminating federal control over the exercise of provincial jurisdiction, "fosters direct dialogue between the province and Treaty 3 First Nations. Such dialogue is key to achieving the goal of reconciliation."

The case included some reminders common to the management of resources across Ontario. The Appeal Court confirmed that Ontario must respect First Nations treaty rights and manage changes to them in accordance with the

Land designation amendments

Changes to the *Indian Act* are set out in Division 8 of the government's second budget Bill C-45. These amendments reduce the voting threshold for a First Nation community to approve a land designation – permitting it to lease a portion of reserve land to a third party – and would authorize the Minister of Aboriginal Affairs (rather than the Governor in Council) to approve such designations. Bill C-45 received Royal Assent on December 14, 2012, and these sections dealing with the *Indian Act* came in force on March 1, 2013.

honour of the Crown and the duty to consult. In particular, Ontario cannot take up lands so as to deprive the First Nation of a meaningful right to harvest in their traditional territories.

Daniels decision:
Court rules Métis and non-status Indians are "Indians"

For years, Métis and non-status Indians (MNSIs) have been treated like "political footballs," with both the federal and provincial governments claiming the other was financially responsible for providing health, educational and social programs. On January 8, 2013, the Federal Court of Canada ruled MNSIs are "Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*, which accords the federal government exclusive authority over "Indians and lands reserved for Indians."

The ruling in *Daniels v. Canada*, if it is upheld, could require Ottawa to provide MNSIs the same tax exemptions, hunting and fishing rights and other benefits currently available to on-reserve First Nations people. On February 6, 2013, the Minister of Aboriginal Affairs and Northern Development Canada announced the government's decision to file an appeal.

The Daniels case was launched in 1999 by the late Métis leader Harry Daniels, who died in 2004. The current plaintiffs are his son Gabriel Daniels (a Métis originally from Edmonton, now living in Ottawa), Leah Gardner (a non-status Anishanabe from Ontario), Terry Joudrey (a non-status Mi'kmaq from Nova Scotia) and the Congress of Aboriginal Peoples (CAP), which offers representation to MNSIs throughout Canada. CAP has been involved in the case for 12 years and has spent a reported two million dollars bringing it to trial.

Based on the historical evidence, the plaintiffs argued that when Rupert's Land and the Northwestern Territory were transferred to the federal government so was jurisdiction over the Métis, then considered part of the "aborigines" peoples. Following Confederation until at least the 1930s, the federal government often treated MNSIs – in legislation and regulation, as well as in its practices and policies – as if they were "Indians" subject to federal jurisdiction. However, for financial and policy reasons, Ottawa reversed its approach in the mid-1980s.

The defendants – the Minister of Indian Affairs and Northern Development and the Attorney General of Canada – countered that the Courts have established that the word "Indian" in s.91(24) was not meant to include the distinct peoples and communities known as the Métis, and that legislation enacted under s.91 (24) must draw a line between those who are considered Indians and those who are not.

The Court sided with the plaintiff's historical interpretation:

> Both in principle and in practice, one of the essential elements of the Indian power was to vest in the federal government the power to

Ottawa to appeal Daniels decision

"The Harper Government continues to work in partnership with Aboriginal organizations and provincial governments to enhance the economic opportunities for Métis and non-status Indians. Our Government must ensure that programs and services to Aboriginal Peoples are fiscally sustainable.

Given that the Federal Court decision in the CAP/Daniels case raises complex legal issues, it is prudent for Canada to obtain a decision from a higher court. After careful consideration of the decision, Canada has filed an appeal, and it would be inappropriate to comment further as the case is before the courts."

Honourable John Duncan,
Former Minister of Aboriginal Affairs and Northern Development Canada
February 6, 2013

> legislate in relation to people who are defined, at least in a significant way, by their native heredity. As said earlier, the factor which distinguishes both non-status Indians and Métis from the rest of Canadians (and has done so when this country was less culturally and ethnically diverse) is that native heritage – their "Indianess"

While granting the plaintiffs' primary request, the Court dismissed two other ancillary declarations. In addition to clarifying MNSI's as Indians under the *Constitution Act*, the plaintiffs had asked the Court to declare that the Queen owes a fiduciary duty to MNSIs as Aboriginal people, and that MNSIs have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal people.

However, the Court ruled that "this is not a s.35 of the Constitution case nor the interpretation or application of particular rights either under the Constitution or under specific agreements, nor is it about Aboriginal rights." It expressed the hope that the resolution of the constitutional issue will facilitate resolving these other matters. Costs were awarded to the plaintiffs.

Private member's bill wins government's support for changes to the *Indian Act*

Bill C-428, the *Indian Act Amendment and Replacement Act*, was introduced June 4, 2012, as a private member's bill by Conservative MP Rob Clarke (Desnethé-Missinippi-Churchill River), who is also chair of the Conservative Aboriginal Caucus. Bill C-428 would repeal the following sections of the *Indian Act*

- The power of the Aboriginal Affairs Minister to disallow by-laws created by First Nations bands
- The power of the Minister to declare the validity of the will of a First Nations person
- Restrictions on the sale of produce grown on reserves
- Restrictions on trade with certain groups of individuals
- Provisions that allow for the establishment of residential schools.

In its preamble, Bill C-428 labels the *Indian Act* "an outdated colonial statute" that "does not provide an adequate legislative framework for the development of self-sufficient and prosperous First Nations' communities." If enacted, the Minister would have to report annually on the work undertaken by his or her department, in collaboration with First Nations organizations and other interested parties, to develop new legislation to replace the *Indian Act*.

The Bill received Second Reading on December 5, 2012, and was referred to the Standing Committee on Aboriginal Affairs and Northern Development. According to the (former) Minister of Aboriginal Affairs John Duncan, "the *Indian Act* is a barrier to the success of many First Nations, which is why we support in principle the private member's bill that proposes concrete, incremental steps to create the conditions for healthier, more self-sufficient First Nations communities … We look forward to studying the bill, exploring opportunities to improve it and passing it into law."

First Nations file suit to halt environmental policies in federal budget until consulted

Two of Alberta's First Nations bands are challenging the federal government's omnibus budget bills claiming Ottawa intends to "dramatically and significantly" reduce environmental protection and environmental assessment in their traditional territories. Mikisew Cree First Nation and Frog Lake First Nation each filed applications with the Federal Court on January 8, 2013, seeking declarations that a number of federal Ministers – including Aboriginal Affairs, Finance, Environment, Fisheries and Oceans, Transport and Natural Resources – have "deliberately and methodically" failed to consult with First Nations regarding the development and implementation of the environmental policies contained in Bills C-38 and C-45.

By promoting resource development and weakening environmental oversight, the plaintiffs claim that the federal government has breached its treaty obligations

to protect and manage their traditional territories from adverse impacts.

Both Mikisew and Frog Lake are seeking an order that the Ministers "not take any further steps or actions that would reduce, remove, or limit Canada's role in any environmental assessment that is being carried out, or that may be carried out in the future," in their traditional territories until adequate consultation is completed.

Frog Lake is a Cree First Nation situated in eastern Alberta near the Saskatchewan border. Mikisew is located in northeastern Alberta and its traditional territory includes the lands around Lake Athabasca, the Peace-Athabasca Delta and south to the Clearwater River, including Fort McMurray.

The lengthy filings detail recent government efforts that the plaintiffs' claim are designed to reduce the scope and extent of federal environmental assessment and environmental protection activities, while increasing the pace and speed at which resource development activity occurs.

These initiatives include amendments to the *Fisheries Act* and the *Species at Risk Act*, as well as the repeal and replacement of the *Canadian Environmental Assessment Act,* set forth in Ottawa's first budget bill C-38. (These amendments are reviewed in-depth in our May 2012 newsletter.)

The second budget bill C-45 introduced additional amendments to limit the protections and application of the *Navigable Waters Protection Act* so that it no longer applies to most navigable waters in the two bands' traditional territories. (See our December 2012 newsletter.)

The plaintiffs claim the federal government not only breached its duty to consult on these initiatives, but has also "frustrate[d] a significant aspect of the treaty by removing Canada from any effective role in managing activities that have the potential to adversely affect the [harvesting] rights assured." The proceedings are on-going and we will report on developments in future issues of this newsletter.

Tsilhqot'in Nation takes lands claim to the Supreme Court

A complex lands claim case going before the Supreme Court of Canada (SCC) will clarify how future disputes over Aboriginal title may be resolved. On January 24, 2013, the SCC announced it would hear an appeal of *William (on behalf of the Tsilhqot'in Nation) v. British Columbia*. (The June 2012 decision by the British Columbia Court of Appeal was reviewed in our September 2012 newsletter.)

The SCC will be asked whether Aboriginal title must be narrowly defined by specific occupied and intensely used sites or by the much larger tracts of land that a First Nation systematically used, season after season, according to its traditional pattern of land use. Both the B.C. and federal governments are opposing the Tsilhqot'in Nation's claims for title.

The BC Court of Appeal affirmed that the Tsilhqot'in Nation had hunting and trapping rights within two tracts of land, totaling 4,380 square kilometres, in the Chilcotin region of west-central BC. It also found that the Crown had interfered with those rights through its forestry development and management practices. The Court ruled that the Tsilhqot'in did not hold Aboriginal title to the entire claim area. The Appeal Court allowed the Tsilhqot'in Nation to pursue title claims to specific sites.

Yukon Court raises bar on 'duty to consult' for mining claims in traditional territories

In a recent decision, the Yukon Court of Appeal has broadened the Crown's duty to undertake meaningful consultation when it allows mineral claims to be recorded in a First Nation's traditional territory. While it hasn't dictated the nature and timing of such consultation, the Appeal Court has declared that simple notice that a claim has been registered is no longer sufficient.

The plaintiff in *Ross River Dena Council v. Government of Yukon* is one of three Yukon First Nations that have not yet settled their claims to Aboriginal title and rights

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with the governments of Yukon and of Canada. The Dena Council is a member of the larger Kaska First Nation, whose traditional territory encompasses more than 63,000 km^2 of the southeastern part of Yukon, known as the Ross River Area.

The current regulatory regime under the Yukon's *Quartz Mining Act* allows mineral claims to be granted without regard to asserted Aboriginal title. It also allows exploratory work that may adversely affect claimed Aboriginal rights to be carried out without consultation.

In November 2011, the Yukon Supreme Court ruled that the Government of Yukon could meet its duty to consult by giving notice to the First Nation after it issues any mineral claim within the claimed territory. The Ross River Dena Council appealed, asserting that consultation must take place before the recording of claims, and that consultation requires more than mere notice of new claims.

The Court of Appeal agreed that the original declaration did not go far enough. It found that "the Ross River Dena have strong claims to Aboriginal rights and title in at least some parts of their traditional territory," and current regime for recording mineral claims within that territory does not measure up to the consultation requirements in *Haida Nation v. British Columbia*. In the Appeal Court's decision issued December 27, 2012, Justice Groberman writes

> The potential impact of mining claims on Aboriginal title and rights is such that mere notice cannot suffice as the sole mechanism of consultation. A more elaborate system must be engrafted onto the regime set out in the *Quartz Mining Act*. In particular, the regime must allow for an appropriate level of consultation before Aboriginal claims are adversely affected.

The Appeal Court ruled that the Government of Yukon has a duty to notify and, where appropriate, consult with and accommodate the plaintiff before allowing any mining exploration activities to take place within the Ross River Area, to the extent that those activities may prejudicially affect Aboriginal rights claimed by the plaintiff.

Given the importance of the "open entry" claim registration system to the mining industry and the economy in general, the Court suggested that the *Quartz Mining Act* may not be the ideal instrument for dealing with claims to Aboriginal rights. It also suggested using section 15 of the Act "to exclude from quartz mining claims all areas in which exploration activities would prejudice claimed Aboriginal rights."

In order that the government has an opportunity "to fashion a more flexible or precise statutory mechanism" to provide for appropriate consultation, the Court ruled that the declarations be suspended for a period of one year.

Yukon seeks to appeal *Ross River Dena* decision

"Understanding how and when the Yukon government is required to consult with the Ross River Dena Council and other Yukon First Nations is key to ensuring strong relationships with First Nations while retaining a healthy mining industry and a growing economy. The government wants direction from the Supreme Court of Canada on when the duty to consult with First Nations arises in the context of mineral staking."

"The Yukon government accepts the Yukon Court of Appeal's decision that there is a duty to consult Ross River Dena Council before mining exploration activities take place. The government will work with First Nations and industry to explore how this consultation can be incorporated into the regime set out in the *Quartz Mining Act*, particularly as it relates to grassroots exploration."

Yukon Premier Darrell Pasloski
February 25, 2013
News Release

Ontario adopts new mining policies to facilitate Aboriginal consultation

A series of policy proposals under the province's modernized *Mining Act* address early consultation with Aboriginal communities, dispute resolution, sites of Aboriginal cultural significance, and assessment work credits. The draft policies were posted to the Environmental Registry by the Ministry of Northern Development and Mines (MNDM) on Dec. 12, 2012. Following only a single public comment, a decision to proceed with all five proposals as described was posted Feb. 5, 2013.

Consultation and Arrangements with Aboriginal Communities at Early Exploration, in accordance with O. Reg 308/12 EBR Registry #011-7764	The Exploration Plans and Exploration Permits regulation (O. Reg 308/12) requires consultation with Aboriginal communities, as well as notification of surface rights owners, and the consideration of input from them as part of the process. This policy applies to the early stages of mineral exploration that may occur after a mining claim has been staked and recorded, and sets out the steps and requirements of the consultation process, as follows: (1) identification by MNDM of communities to be notified and consulted, (2) recording of mining claims, (3) submission of an exploration plan, (4) application for an exploration permit, (5) action to be taken if no response is received from Aboriginal communities, (6) amelioration of the capacity of communities to participate, (7) mitigation and accommodation of identified impacts to existing or asserted Aboriginal or treaty rights, (8) record keeping and reporting. The policy also covers incorporation of arrangements reached between Aboriginal communities and early exploration proponents in permitting decisions. It provides draft guidelines for consultation related to Aboriginal and treaty rights.
Dispute Resolution at Early Exploration, pursuant to s.170.1 of the *Mining Act* and O. Reg. 308/12 EBR Registry #011-7758	Disputes about appropriate mitigation measures to address potential adverse effects to Aboriginal or treaty rights may be referred to an independent third party in order to facilitate consultation. However, such referrals are intended to be a "last resort" after other efforts have been exhausted and will only be made on recommendation of the MNDM Mineral Exploration and Development Consultant. This policy sets forth considerations in appointing a third party facilitator, those issues that might be referred, those that are beyond the mandate of MNDM to facilitate or resolve, and the qualifications of the third party. The third party must report to the Minister within 30 days of the referral of the consultation process, including any recommendations. Note, MNDM will not compel parties to participate with a third party and a referral to a facilitator is not a prerequisite to MNDM making a decision.
Sites of Aboriginal Cultural Significance – Withdrawals and Surface Rights Restrictions, for the purposes of ss.35 & 51 of the Mining Act EBR Registry #011-7761	Under O. Reg 45/11, land with a surface area of 25 hectares or less may be considered as a site of Aboriginal cultural significance if: it is strongly associated with an Aboriginal community for social, cultural, sacred or ceremonial reasons or because of its traditional use according to Aboriginal traditions, observances, customs or beliefs; it may be clearly delineated on a map; and identification is supported by the community as a whole. This operational policy elaborates on the regulatory criteria, and sets forth the process for an application for withdrawal of such lands from prospecting, staking, sale and lease, the reopening of lands, and the consideration of surface rights restrictions. The policy is not intended to address trap lines, hunting or fishing grounds, wildlife migration routes, travel or trade routes, waterways, or lands that have been identified in land claims, treaty land entitlement cases, or for protection through Far North planning exercises. Those lands will continue to be considered for withdrawals or other measures through MNDM's usual processes.
Assessment Work Credits – Eligible Expenses Related to Consultation with Aboriginal Communities EBR Registry #011-7736	In order to encourage early and ongoing consultation as a best practice, MNDM allows assessment work credits for expenses reasonably incurred in conducting Aboriginal consultation. Eligible credits may include the cost of document and map preparation, travel, meetings, honoraria for elders or other community members directly participating in a consultation process, third party review of technical documents, studies or mapping projects, administration and other expenses. Credit will be given only for costs related to consultation conducted with those communities identified by MNDM for consultation. Credit will not be allowed for "monies paid by way of 'access' or to simply enter a consultation process, unless directly attributable to, and structured as, supporting the capacity of a community to participate in the consultation process," or for goodwill contributions.

Meet Willms & Shier Legal Experts at these Upcoming Events		
April 29	Air Emissions Session Canadian Environmental Conference and Tradeshow (CANECT) 2013 International Centre, Mississauga	**John Georgakopoulos** is the co-chair and will discuss how O. Reg. 419 regulates air emissions; **Jacquelyn Stevens** will address the legal aspects of nuisance; and **Joanna Vince** will discuss getting the right approach to greenhouse gases.
April 30	Water & Wastewater Session Canadian Environmental Conference and Tradeshow (CANECT) 2013 International Centre, Mississauga	**Juli Abouchar** will chair this session. Juli will present an overview of the regulatory regime for water and wastewater, and on *Fisheries Act* enforcement. Marc will discuss discharges, spills and cost recovery orders, and the due diligence to an environmental prosecution.
May 1	Waste Management Session Canadian Environmental Conference and Tradeshow (CANECT) 2013 International Centre, Mississauga	**Jacquelyn Stevens** discusses the integration of the federal/ provincial regulatory regime; **John Georgakopoulos** presents What is Waste? What Should be waste?; and **Joanna Vince** discusses environmental assessment for waste management.
May 9	The Water Management for Mining Summit, hosted by Infocast St. Andrew's Club & Conference Centre, Toronto	**Juli Abouchar** presents on what's new with the regulation of water for mines in Ontario.

BC First Nation files for injunction to stop ratification of Canada-China trade pact

On January 18, 2013, Hupacasath First Nation filed an application for an injunction with the Federal Court seeking to stop the federal government from bringing the Canada-China Foreign Investment Promotion and Protection Agreement (FIPPA) into force until it consults with First Nations.

"Any effort to ratify the FIPPA in a hasty manner that violates the government's duty to meaningfully consult and accommodate would taint the honour of the Crown," says Brenda Sayers, Councillor of the Hupacasath First Nation. The application states that "some" of the modern treaties negotiated with British Columbia and Canada "address Canada's obligation to consult prior to entering into international agreements which may affect treaty rights."

Located in Port Alberni, BC, the Hupacasath First Nation consists of approximately 300 members and five reserves. Its traditional territory, which includes the whole Alberni Valley, contains extensive coal reserves.

The band is concerned that FIPPA could be used to gut environmental protections, strip the First Nation's negotiating powers over resource development, and permit Chinese investors to challenge any controls placed on extraction activities. The Canada-China FIPPA was signed September 8, 2012; however, the Order in Council needed to bring the agreement into force has yet to be issued.

The Union of British Columbia Indian Chiefs and the Serpent River First Nation on behalf of First Nations in Ontario have also filed an affidavit in support of the Hupacasath's Federal Court application. The affidavit states that FIPPA will have serious negative effects on First Nations' Treaty and other rights and that Canada must enter into an open-ended dialogue with First Nations focused on a new and acceptable investment and/or trade agreement.

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