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Environment Indigenous Energy Law

Consultation Expectations: Can the Government Change its Consultation Approach and Still Satisfy its Duty to Consult?

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Federal, provincial, and territorial governments have a duty to consult Indigenous peoples when the government has knowledge of an Aboriginal right or claim that could be affected by a government's decision.[1] The duty to consult is grounded in the "honour of the Crown."[2] The honour of the Crown requires the government to act in "good faith to provide meaningful consultation appropriate to the circumstances."[3]

As the content of the duty to consult exists on a spectrum, it is not always clear what kind of consultation measures the government must take to satisfy its duty to consult. Case-by-case, courts have provided guidance as to what measures are required in various circumstances.

The Ontario Superior Court of Justice in *Eabametoong First Nation v Minister of Northern Development and Mines*[4] provides direction about what is included in consultation at the low end of the spectrum, and the government's ability to change its approach to consultation during a particular consultation.

The Facts

Eabametoong First Nation (Eabametoong) is an Anishinabek Nation. Eabametoong's reserve is located at Fort Hope in Northern Ontario. Under Treaty 9, the government has the right to "take up" Eabametoong's traditional land for mining.[5] However, Eabametoong retains the right to "pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered."[6]

Landore Resources Canada Inc. (Landore) is a mining company. On October 10, 2013, Landore applied to the Ministry of Northern Development and Mines (the Ministry) for a permit to conduct exploratory drilling in Eabametoong's traditional territory.

The Ministry recognized it had a duty to consult Eabametoong before deciding whether to grant Landore a permit and delegated aspects of the consultation process to Landore. Landore contacted Eabametoong and both parties agreed to have a face-to-face meeting and to enter into a

[1] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35 [*Haida*].
[2] *Ibid* at para 16.
[3] *Ibid* para 39.
[4] 2018 ONSC 4316 [*Eabametoong*].
[5] *Ibid* at paras 5, 91.
[6] *Ibid* at para 5.

Memorandum of Understanding (MOU) to formalize each party's intention to act in good faith and with respect.[7]

Landore and Eabametoong met on December 5, 2013 and July 7, 2014 to discuss the proposed drilling. At the second meeting, Eabametoong expressed concerns about the adverse effects of the proposed drilling on fish and wildlife.[8] Landore committed to a follow-up community meeting with Eabametoong.

Eabametoong made efforts to schedule the community meeting with Landore, but Landore did not respond.[9] In the fall of 2015, the Ministry intervened to coordinate the meeting but was also unsuccessful because Landore was unavailable.[10] A community meeting never took place and a MOU was never executed.

On January 19, 2016, Landore and the Ministry met privately, without Eabametoong's knowledge. Landore advised the Ministry that it was negotiating with Barrick, a gold mining company, and needed the Ministry to approve the permit as soon as possible.[11]

On March 31, 2016, the Ministry granted Landore a permit.[12] Eabametoong brought an application for judicial review.

The Parties' Arguments

Eabametoong argued that the Ministry's decision to issue the permit was unreasonable because the Ministry failed to meet its duty to consult.[13] Eabametoong argued the Ministry and Landore committed to a community meeting and a Memorandum of Understanding (MOU) and then unilaterally changed course without explanation and without providing Eabametoong an opportunity to respond.[14]

The Ministry and Landore argued that they satisfied the duty to consult by providing timely notice of Landore's permit application and giving Eabametoong over two and a half years to raise concerns.[15] The Ministry also argued that there is no legal requirement to enter into an MOU and doing so was against the Ministry's policy.[16]

The Court's Decision

The Ontario Superior Court of Justice held that the duty to consult was at the lower end of the spectrum, but that the Ministry had breached its duty to consult.

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[7] *Ibid* at paras 34, 96.
[8] *Ibid* at para 47.
[9] *Ibid* at para 101.
[10] *Ibid* at para 54.
[11] *Ibid* at para 58.
[12] *Ibid* at para 73.
[13] *Ibid* at para 77.
[14] *Ibid*.
[15] *Ibid* at paras 82, 87.
[16] *Ibid* at para 118.

The Court concluded that consultation was at the low end because Treaty 9 and in particular the taking up language meant that Eabametoong's claim to title of the lands is a weak one, and that the potential impact of exploration activities was also not as serious as actual resource extraction.

The Court found that consultation even at the low end must involve "talking together for mutual understanding."[17] This requires real engagement aimed at promoting reconciliation between the government and indigenous peoples.[18] The key question is whether the consultation could reasonably have been found to have maintained the honour of the Crown and fulfilled its duty to attempt to further the goal of reconciliation.[19]

The Court held that the Ministry and Landore's actions were not consistent with promoting reconciliation. Landore created an expectation that there would be a community meeting and that Landor would negotiate a Memorandum of Understanding with Eabametoong. It was unreasonable for the Ministry to conclude that consultation had occurred when the community meeting that the Ministry itself had been trying to coordinate had not taken place.[20]

Further, the Ministry was aware that Landore had committed to entering into a MOU. The Ministry did not communicate to Eabametoong that there was no legal or policy requirement for a MOU. The Court held that it is not honourable for a government body to allow its delegate to create expectations with an Indigenous community and then not inform the community that those expectations are contrary to legal requirements.[21]

The Court stated that the Ministry does have the right to change the consultation process in spite of any expectations that the Ministry or its delegate may have created.[22] However, the Ministry must do so in a way that does not compromise the objectives of the duty to consult, namely, upholding the honour of the Crown by attempting to promote reconciliation.[23]

After the Ministry's private meeting with Landore, the Ministry's focus appears to have switched from facilitating consultation to ensuring that Landore had its permit in time to engage in negotiations with Barrick.[24] Case law has established that "the Crown may not conclude a consultation process in consideration of external timing pressures when there are outstanding issues to be discussed."[25]

The Court concluded that while the standard required to satisfy the duty to consult is not perfection, the Ministry and Landore's actions did not constitute "talking together for mutual understanding."[26] There was no real and genuine attempt by the Ministry or Landore to listen to

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[17] *Ibid* at para 92, citing *Haida*, *supra* note 1 at para 43.
[18] *Ibid* at para 92.
[19] *Ibid* at para 4.
[20] *Ibid* at para 109.
[21] *Ibid* at para 118.
[22] *Ibid* at para 110.
[23] *Ibid*.
[24] *Ibid* at para 111.
[25] *Ibid* at para 114, citing *Squamish Nation v British Columbia (Minister of Community Sport and Cultural Development)*, 2014 BCSC 991 at para 214.
[26] *Ibid* at para 120.

and address Eabametoong's concerns.[27] Landore and the Ministry foreclosed the expected opportunity for discussion without explanation and the Ministry proceeded to make its decision unilaterally.[28] Although the Court found the Ministry was not deliberately attempting to do anything untrustworthy, the Ministry's conduct was not consistent with the type of conduct that would promote reconciliation between the Crown and Indigenous peoples.[29]

Conclusions

In determining whether government conduct satisfies the duty to consult, the central question is whether the conduct was consistent with furthering the goal of reconciliation.[30] We learn from *Eabametoong* that a government unilaterally changing an expected consultation process without explanation and without the opportunity for response by the Indigenous community is not consistent with reconciliation and will not satisfy the duty to consult.

The case is also a reminder that conduct by the government or its delegate can give rise to expectations for consultation that, while not otherwise required by law, must be met to satisfy the duty to consult. Where such expectations exist, the government or its delegate will have to provide reasons for the change in approach and an opportunity for the Indigenous community to respond prior to changing the consultation process.

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[27] *Ibid*.
[28] *Ibid*.
[29] *Ibid* at para 121.
[30] *Ibid* at para 4.