Is There a Duty to Consult on Legislation? SCC May Decide

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This week the SCC received an application to hear an appeal of the Federal Court of Appeal ("FCA") decision in *Canada (Governor General In Council) v Courtoreille*[1] *("Courtoreille")*. The FCA allowed the appeal from the lower court decision and held that the Crown does not have a duty to consult when "contemplating changes to legislation that may adversely impact treaty rights."[2] This decision engages well established democratic principles, Constitutional rights, the development of Aboriginal Law and the duty to consult.

Background

In 2012, the federal government introduced two omnibus bills, Bills C-38 and C-45 (the "Omnibus Bills"). The Omnibus Bills amended several federal environmental laws, including the *Fisheries Act*,[3] *Species at Risk Act*,[4] *Canadian Environmental Protection Act, 1999*[5] and former *Navigable Waters Protection Act (now the Navigation Protection Act)*.[6] The Omnibus Bills also repealed and replaced the *Canadian Environmental Assessment Act*.[7] The purpose of these changes was to streamline the permitting process for many projects.

Chief Courtoreille and the Mikisew Cree First Nation ("Mikisew Cree"), signatories to Treaty 8, brought an application for judicial review, alleging that the Omnibus Bills "reduced federal regulatory oversight on works and projects that might affect their treaty rights to hunt, fish and trap."[8] The Mikisew Cree argued that they should have been consulted during the development of the Omnibus Bills.

The Mikisew Cree's argument raises an important issue for Aboriginal law that has yet to be considered by the Supreme Court of Canada. In *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, the Supreme Court noted that the duty to consult attaches to strategic, higher level decisions.[9] Examples of strategic decisions giving rise to the duty to consult include forest stewardship plans, municipal land use plans, and regional water management plans. The case

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1 2016 FCA 311 [*Courtoreille*].
2 Ibid at para 2.
3 RSC 1985, c F-14.
4 SC 2002, c 29
5 SC 1999, c 33.
6 RSC 1985, c N-22.
7 SC 1992, c 37; SC 2012, c 19, s 52.
8 *Courtoreille* at para 1.
9 2010 SCC 43.

leaves open the question of whether, and to what extent, legislative action or reform triggers the duty to consult.[10]

Mikisew Cree were successful in the first decision. The Federal Court found that the federal government had a duty to consult the Mikisew Cree for certain amendments to the *Navigation Protection Act* and *Fisheries Act* which had the potential to adversely impact fishing and trapping rights. This duty was triggered when the Omnibus Bills were introduced to Parliament, and included a duty to give notice and a reasonable opportunity to make submissions. However, the Federal Court also found that the duty did not include a duty to accommodate since the provisions had yet to be applied to any specific situations.

Decision on Appeal

The FCA overturned the Federal Court's decision. Writing for the majority, Justices De Montigny and Webb noted that legislative action is "not a proper subject" for judicial review and that imposing the duty to consult on the legislative process "offends the separation of powers doctrine and principle of parliamentary privilege."[11]

The majority found that the well-established parliamentary sovereignty and separation of powers doctrines justified the Court's refusal to impose a duty to consult during the legislative process. It determined that courts should not meddle with the legislative process, and would only intervene "after legislation is enacted and not before."[12] The FCA went on to raise the following concerns:

> Imposing a duty to consult at any stage of the process, as a legal requirement, would not only be impractical and cumbersome… but would fetter ministers and other members of Parliament in their law-making capacity.[13]

The majority further noted that a statute is still open to constitutional challenge, and went as far as to advise that consultation before the adoption of an impugned statute would be key in "determining whether the infringement of an Aboriginal or treaty right is justified."[14] The FCA did not provide further detail about when such consultation should take place.

In Justice Pelletier's concurring reasons, he allowed the appeal on the basis that the Omnibus Bill amendments were of general application, and the duty to consult is not triggered by legislation of general application across Canada affecting all of its occupants. Pelletier, J. left the door open for the duty to consult to be triggered by legislation whose effects are "specific" to particular Indigenous peoples, or to specific territories in which they have in interest.[15]

Significance of the Decision

The Mikisew Cree challenge appears already to be affecting the development of legislation. The federal government is currently engaging Indigenous people about the same environmental legislation impacted by the Omnibus Bills through: (i) hearings before panels of experts in numerous cities across the country: (ii) parliamentary committee hearings; and (iii) funding Indigenous communities and First Nations to participate in the hearings through oral and written comments.

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10 *Courtoreille* at para 47.
11 *Ibid* at para 3.
12 *Ibid* at paras 52 and 53.
13 *Ibid* at paras 59 and 60.
14 *Ibid* at paras 51 and 63.
15 *Ibid* at paras 84 and 91.

This is consistent with the majority's statement that "it is good politics to engage… Aboriginal groups on legislative initiatives which may affect them or regarding which they have a keen interest before introducing legislative initiatives into Parliament."[16] However, the majority acknowledged that these forums may not be sufficient to meet the obligations arising from the duty to consult.

The majority also noted that the application of legislation is open to constitutional challenges if used to justify a decision that would "impede or prevent the enjoyment" of Indigenous rights.[17] However, these avenues of recourse are costly, "after the fact" and are reactive, rather than proactive.

This case raises important issues for democracy and Aboriginal law. If the Supreme Court chooses to hear the appeal, how will the Supreme Court draw the balance between allowing the legislature to draft without interference from the judiciary, while meeting the Aboriginal law principles of the honour of the Crown, duty to consult and reconciliation? Is the government constitutionally required to consult with Indigenous people before introducing legislation? Is the duty triggered at some other point before Royal Proclamation? Is the duty engaged by legislation with specific effects or more general legislation? How "specific" do the effects need to be? And what is the scope of meaningful consultation on legislation?

These are all vital questions, and Willms & Shier will provide updates as the law develops.

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16 *Ibid* at para 61 and 62.
17 *Ibid* at para 51.