Saugeen First Nation v Ontario: Court Comments on Crown Role and Consultation Funding

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The Ontario Divisional Court recently released its decision in *Saugeen First Nation v Ontario*.[1] In many ways, this decision describes a case study for the wrong way to consult. By way of contrast, the Court took the opportunity to clarify the importance of a Crown-led coherent, structured process for the duty to consult and offered brief comment on the role of consultation funding for Indigenous groups.

Overview

In 2008, T & P Hayes Ltd (Hayes) applied for a licence to quarry limestone from private property on the Saugeen/Bruce Peninsula in the traditional territory of the Saugeen Ojibway Nation (SON).

SON received periodically updated lists of outstanding aggregate licence applications from the Crown. The list contained dozens of applications and SON had one staff member to attend to all SON environmental matters. In 2008, the Crown added the Hayes application to that general list sent to SON. Hayes fulfilled its statutory public notice obligations with advertisements in the local newspapers and signs at the site itself.

In September 2011, SON learned about the licence application through a notice of zoning change. SON asserted its concerns to the Ministry of Natural Resources and Forestry (MNRF). By this time, the quarry project was in advanced stages of planning. SON requested that activity and approval for the projects not proceed until consultation had taken place, and provided a flow chart suggesting a consultation process.

What followed was correspondence between SON and MNRF wherein the Court found that MNRF attempted to address preliminary issues and substantive issues all at once. In other words, before setting out a process that would allow for a meaningful exchange of information, MNRF wanted to understand SON's concerns about the licence application itself.[2]

Following a meeting in 2012, MNRF offered to provide some funding to SON to participate in the consultation process. In February 2013, MNRF advised that it intended to recommend approval of the licence and terminate consultations unilaterally. In June 2013, MNRF set out a consultation process that delegated many consultative duties to Hayes. Hayes refused to deal directly with SON, and MNRF did not implement the consultation process.

On March 8, 2016, the MNRF approved the licence application. SON brought an application for judicial review of the decision to issue the licence.

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1 *Saugeen First Nation v Ontario*, 2017 ONSC 3456.
2 *Saugeen First Nation v Ontario* at para 80.

Decision of the Court

The Court set aside the licence approval without prejudice to it being reissued following appropriate consultation with SON.

At trial, both parties agreed that the Crown holds the constitutional duty to consult SON. However, they disagreed on the scope of the duty and whether it had been reasonably discharged. The Court found that it could not know whether substantive concerns had been addressed because the process itself was deeply flawed:

The Court reviewed several specific aspects of the consultation process.

Notice

The Court found that SON did not learn about the Hayes application at the time that its licence application was added to the general list as there were more than 500 quarries in SON's traditional territory and dozens of applications on the general list at any one time.

The Court held that notice must be affirmatively established by the Crown.[3] Notice cannot be inferred.

Preliminary Assessment of the Scope of Consultation

MNRF asserted that it completed an assessment of the Crown's duty to consult in 2009, and assessed it to be low. There are no records of this assessment. The Crown did not advise SON of these assessments until 2011.

The Court several times made reference to the failure of the Crown to provide notice of its assessment of the scope of the duty to SON.

Structure of the Consultation Process

The Court found that MNRF was "reactive and ad hoc" throughout the consultation process.[4] This finding is borne out by the record, where the process starts and stops, and at times is unilaterally terminated by MNRF.

The Court reviewed MNRF's communications that set expectations for process and noted that the process was not followed, nor was an alternate process put in place. The Court held that, moving forward the Crown had an obligation to adhere to process that it set out.

> The proper process now, is for MNRF to fund SON as it agreed to do, for SON to obtain the expert assistance it requires, and for the parties to then discuss SON's concerns. It will be for the Crown to decide what process to follow if unresolved issues remain after these consultations.[5]

The Court emphasized that consultation processes are not set in stone, and may change over time. However, it is for the Crown to devise the consultation process, and once that process is established it is not reasonable to change the process without explanation.[6]

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[3] *Saugeen First Nation v Ontario* at para 49.
[4] *Saugeen First Nation v Ontario* at para 6.
[5] *Saugeen First Nation v Ontario* at para 123.
[6] *Saugeen First Nation v Ontario* at para 125.

Funding

The Court found that MNRF had agreed to provide SON with funding, and so did not have to make a determination about whether the duty to consult implies a duty to provide consultation funding. However, the Court offered the following comments about the context in which SON requested funding:

> SON has limited resources. It does not participate in consultations as a party to the Project. The expense of consultation arises as a result of a proponent's desire to pursue a project, usually for gain, and the Crown's desire to see the project move ahead. The Crown should not reasonably expect SON to absorb consultation costs from SON's general resources in these circumstances.[7]

Ultimately, the Court found that, in the absence of an agreement to provide funding, it is "open to the Crown, in an appropriate case, to reject a request for funding and to decide that a First Nation did not require expert assistance to participate adequately in consultations. Such a decision would be reviewed in this court on a standard of reasonableness."[8]

Implications

The Court reinforced the importance of the Crown's role to provide structured consultation. Repeatedly, the Court referred to *Haida Nation* in rejecting an unstructured administrative regime as insufficient.[9] The Crown alone bears the burden of identifying the Indigenous groups to be consulted, affirmatively providing notice, clarifying the process and scope of the consultation, and supervising the consultation. In this instance, the proponent declined to take on delegated consultation. While any proponent may decline to perform consultation, to do so significantly increases project risks.

The Court's decision emphasized that determining whether funding is appropriate in each case is a fact-driven analysis. The reasonableness of the Crown's approach will depend on the entire context.

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7 *Saugeen First Nation v Ontario* at para 159.
8 *Saugeen First Nation v Ontario* at para 127.
9 *Saugeen First Nation v Ontario* at para 20.