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No Duty to Consult Triggered by Omnibus Changes to Environmental Laws

Aboriginal Law Bulletin

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In *Canada (Governor General In Council) v. Courtoreille,* 2016 FCA 311, the Federal Court of Appeal found that the federal government did not owe a duty to consult when it developed and implemented changes to environmental legislation through two omnibus bills.

Background

In 2012, the former Conservative government introduced two omnibus bills which repealed the *Canadian Environmental Assessment Act*, narrowed the application of the former *Navigable Waters Protection Act* and changed the habitat protection provisions of the *Fisheries Act*. The federal government did not consult with Inuit, Métis or First Nations in relation to these changes. The Mikisew Cree First Nation ("Mikisew") applied to the Court seeking a declaration that federal government owed them a duty to consult before the omnibus bills were presented to Parliament.

At trial, the Federal Court found that the duty to consult had been triggered and the Mikisew were entitled to notice and a reasonable opportunity to make submissions when the omnibus bills were submitted to Parliament. The Federal Court of Appeal disagreed and found that the federal government's conduct during the development of draft legislation did not trigger the duty to consult.

Majority Decision

Justices de Montigny and Webb found the Court had no jurisdiction to judicially review the federal government's actions prior to the introduction of the omnibus bills into Parliament. The majority found that while courts are within their power to review legislation once it becomes law, they are barred from intervening in the law-making process before a bill has been approved by both Houses of Parliament and has received Royal Assent. The majority decided it could not impose any procedural constraints on the process of developing draft legislation without offending Parliament's sovereign power to make or unmake any law.

Concurring Decision

Justice Pelletier found the Court had jurisdiction to consider Mikisew's challenge, but that the duty to consult had not been triggered because the omnibus bills applied generally to all of Canada and their effects were not specific to any particular Aboriginal group or territory. Requiring consultation prior to the enactment of such legislation would set up an impossible scenario for the Crown given the time, resources and complexity required to consult each potentially affected Aboriginal group, which could ultimately stifle Parliament's law-making function. In the result, Justice Pelletier agreed with the majority that it would be inappropriate for the Court to intervene.

In obiter, Justice Pelletier chose to emphasize that it may be possible for the duty to consult to be triggered if legislation was passed for the sole purpose of authorizing a specific project which could potentially damage claimed or proven Aboriginal rights. However, Justice Pelletier was careful to note that, even in these hypothetical circumstances, consultation must not be allowed to frustrate the ability of the federal government to discharge its other functions and duties.

Conclusion

The underlying question of whether a legal duty to consult arises in the legislative process has remained a key uncertainty that has very significant policy implications. This is particularly the case given the Government of Canada's May 2016 commitment to implement the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP"), including Article 19 and its requirement to seek to obtain free, prior and informed consent when "implementing legislative or administrative measures that may affect them."

Canadian law currently provides that seeking consent only becomes a matter of law in the case of proven Aboriginal title, and additionally that the duty to consult does not arise unless there is a sufficient causal link between contemplated government action and the Aboriginal rights of a specific Aboriginal group. Justice Pelletier's concurring reasons raise the possibility that the duty to consult may be triggered when Aboriginal groups can establish that government action during the law-making process could directly affect their Aboriginal rights or claims. It remains to be seen whether Canada will go this far in implementing UNDRIP.

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