BLG PRESENTATION TO
CANADIAN CORPORATE
COUNSEL ASSOCIATION - BC

Key Developments in Indigenous Law

Presented By

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THEME ONE

Consultation, Accommodation & Consent

Ignace v. British Columbia (Chief Inspector of Mines), 2021 BCSC 1989 (October 12, 2021)

Summary

- The Ministry issued an amended permit for a quarry operated by Canadian National Railway Company (CNR); the Stk'emlupsemc Te Secwepemc Nation (SSN) sought to have the permit set aside and the quarry closed.
- Neither CNR nor the Ministry secured SSN's explicit support for the permit amendment, but proceeded on the belief that it had fulfilled the duty to consult.
- The consultation process was marred with a lack of communication, misunderstanding, and nonalignment of interests from all parties.
- The Province had to reconsider its decision to approve the permit amendment, but the permit was not quashed.

Ignace v. British Columbia (Chief Inspector of Mines), 2021 BCSC 1989

Significance

- No new legal principles, but the decision provides a concise overview of the obligations on the Crown, Indigenous group and proponent in the consultation process, and a valuable illustration of the challenges that often arise in consultation processes.

Ermineskin v. Canada, 2021 FC 758 (July 19, 2021)

Summary

- Ermineskin Cree Nation and Coalspur entered into an Impact Benefit Agreement (IBA), which would result in compensation to Ermineskin for adverse impact on Ermineskin's treaty rights.
- The Minister issued a Designation Order without consulting Ermineskin.
- Ermineskin argued the Designation Order would have adverse impact on Ermineskin's aboriginal and treaty rights including economic opportunities.
- Order quashed because the IBA contained valuable economic rights and benefits closely related to and derivative from aboriginal rights and therefore gave rise to the duty to consult.

Ermineskin v. Canada, 2021 FC 758

Significance

- Crown owes a duty to consult any First Nation whose Aboriginal rights might be adversely impacted by the Crown's decision.
- Duty to consult includes Indigenous groups who may lose economic benefits from a Project as a result of the Crown's deferral or rejection of a Project, not just those who might be adversely affected by the Project itself.

Grassy Mountain, IAAC Joint Review Panel (June 17, 2021)

Summary

- Joint Review Panel rejected application for the construction and operation of a new open-pit coalmine that was within the traditional territory of several different Indigenous groups, including the First Nations of Treaty 7.
- Many of the Indigenous groups – particularly those most directly affected by the mine – signed confidential Impact Benefit Agreements.
- The Panel concluded the Project was not in the public interest because of the character and severity of the environmental impact, despite the non-opposition of Indigenous groups.

Grassy Mountain, IAAC Joint Review Panel

Significance

- Indigenous support for a project is often a necessary condition for project approval, but not sufficient on its own where the Crown has reason to independently determine that a project is likely to have significant adverse effects.
- Proponents often use IBAs to secure Indigenous support. Where IBAs are confidential, proponents need to find a way to explain the nature and scale of benefits, and how they addressed environmental concerns that the Indigenous group may have raised earlier in the course of a project's review.

UNDRIP - Federal Legislation (June 21, 2021); BC Action Plan (fall 2021)

Summary

- The federal *United Nations Declaration on the Rights of Indigenous Peoples Act* received Royal Assent and came into force on June 21, 2021 (the "Act").
- The Act affirms the United Nations Declaration on the Rights of Indigenous Peoples (the "Declaration") as "a framework for the Government of Canada's implementation of the Declaration" and requires an Action Plan and the alignment of Canadian laws with the Declaration.
- The Declaration itself contains several important principles, including requirements on governments to seek the "free, prior and informed consent" (FPIC) of Indigenous groups in various situations.
- BC *Declaration on the Rights of Indigenous Peoples Act* (2019) follows a similar framework. BC announced its initial Action Plan in the fall of 2021, which speaks to many themes, including a desire to negotiate co-management agreements as a means of securing FPIC.

UNDRIP

Significance

- The Declaration, and the federal and provincial Acts, are changing expectations around the basis of engagement between the Crown, Indigenous groups and industry.
- Indigenous groups increasingly are rejecting "consultation" as insufficient, and seeking to be engaged as governments with jurisdiction and stewardship responsibilities throughout their territories.
- Private sector is increasing its attempts to pro-actively develop "partnership" based relationships with key Indigenous groups to facilitate project development.

AltaLink Management Ltd. v Alberta (Utilities Commission, 2021 ABCA 342 (October 15, 2021)

Summary

- AltaLink built a transmission line through the reserves of the Piikani and Kainai (Blood) Nations. AltaLink secured the consent of the Nations by creating Limited Partnerships with the Nations to own and operate the new line. This resulted in additional costs.
- The Commission rejected the LPs request to pass these costs onto customers through new rates (tariff).
- The court allowed the LPs to include the additional costs:
  - Securing the Nations' support was critical to being able to build the line and avoid costly alternatives; and
  - The benefits to the Nations were in the public interest.

AltaLink Management Ltd. v Alberta (Utilities Commission, 2021 ABCA 342

Significance

- Strong precedent for future decisions on when and to what extent a regulated utility may pass along to their customers the costs incurred by the utility to secure Indigenous support for its works.
- Represents a significant milestone in judicial commentary on reconciliation and the public interest.

THEME TWO

Cumulative Effects & Other Implications from Historic Developments

Yahey v. British Columbia, 2021 BCSC 1287 (June 29, 2021)

Summary

- Under Treaty 8, the Blueberry River First Nations challenged the cumulative effects of industrial development in its territory by the Province.
- The court ruled that the Province unjustifiably infringed Blueberry's treaty rights in permitting the cumulative impacts of industrial development to an extent that denied them a meaningful opportunity for the exercise of treaty rights.
- Provided interpretation of *Mikisew* test for treaty infringement: "no meaningful right".

Yahey v. British Columbia, 2021 BCSC 1287

Significance

- Existing consultation and approval processes may be inadequate to assess cumulative effects.
- Other Treaty First Nations – and some non-treaty First Nations – are increasingly making similar arguments around the cumulative effects from historic and recent decisions.

Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc., 2022 BCSC 15**(January 7, 2022)**

Summary

- The First Nations sued Rio Tinto Alcan (RTA), initially without also naming the Crown, for damages to their aboriginal rights resulting from impacts to the Nechako River arising from the development and operation of the Kenney Dam for hydro-electric development.
- The Court concluded that a private entity could be liable, under a claim of nuisance, for damage to aboriginal rights, that the First Nations have various aboriginal rights, and the Kenney Dam had caused damage to those rights.
- However, RTA was entitled to rely on the defence of statutory authority, in that the harm caused was a direct result of what they were specifically authorized to do.
- The First Nations did secure an order that the Crown must take measures to protect their aboriginal rights.

Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc., 2022 BCSC 15**(January 7, 2022)**

Significance

- Private entities may have personal liability if they infringe aboriginal rights without (or beyond the scope of) crown authorization.
- First Nations can use such an action as the forum to prove their aboriginal rights, so long as they also name the Crown as defendants.
- The courts are clearly wrestling with how to craft appropriate remedies, in the context of claims based on historic developments that were authorized by the Crown before First Nations had their claims recognized through (prior) litigation or treaty.

THEME THREE

Clarifying the Scope of Aboriginal Rights

R. v. Desautel, 2021 SCC 17 (April 23, 2021)

Summary

- The Lakes Tribe, based in Washington State, have Aboriginal rights to hunt in the ancestral territory of the Sinixt in British Columbia.
- The "aboriginal people of Canada" in section 35 of the *Constitution Act, 1982* means the modern-day successors of aboriginal societies that occupied Canadian territory at the time of European contact, even if they later moved or were forced to move elsewhere, so long as they maintained a connection to their territory in Canada.
- Canadian residency and citizenship are not pre-requisites to a person claiming section 35 rights.

R. v. Desautel, 2021 SCC 17

Significance

- The Lakes Tribe may have further Aboriginal rights in Canada.
- Canada and BC need to consult the Lakes Tribe on decisions that could adversely affect their aboriginal rights.
- Other Indigenous groups along the Canadian-American border may be able to make similar claims.

Chippewas of Saugeen First Nation et al. v. The Attorney General of Canada et al., 2021 ONSC 4181 (July 29, 2021)

Summary

- Phase 1 in a two-phase process. Saugeen Ojibway Nation (“SON”) unsuccessfully claimed aboriginal title to a portion of Lake Huron, including approximately half of Georgian Bay.
- Court ruled SON did not meet the test established by the Supreme Court in *Tsilhqot’in Nation*.
- Court ruled that the Crown had breached its treaty promise to protect the Bruce Peninsula from encroachment.

Chippewas of Saugeen First Nation et al. v. The Attorney General of Canada et al., 2021 ONSC 4181

Significance

- First case to consider whether Aboriginal title can extend to submerged land.
- If successfully proven, SON's alleged Aboriginal title could affect the public right of navigation (which provides for reasonable public use of navigable waters), which the Supreme Court of Canada has stated is paramount.
- Illustrates length and complexity of litigating aboriginal title claims.

THEME FOUR

Crown Tenures & Liabilities

Southwind v. Canada, 2021 SCC 28 (July 16, 2021)

Summary

- Province authorized a hydroelectric dam despite repeated warnings about the considerable damage the resulting flooding would cause the Lac Seul First Nation ("LSFN") reserve.
- The trial court ruled that Canada breached its fiduciary duty to protect LSFN interests in the reserve and was liable to pay LSFN for the loss of the flooded lands using conventional expropriation principles for compensation.
- The Supreme Court of Canada found that the fiduciary duty required Canada to consider the value of the land to the project, and not limit its position based on a general public interest in the project.

Southwind v. Canada, 2021 SCC 28

Significance

- Shows the supremacy of Canada’s fiduciary accountability to Indigenous peoples over its public interest obligations.
- Clarifies how courts should assess equitable compensation for a breach of Canada’s fiduciary duty to Indigenous peoples in the context of reserve lands.
- May affect how First Nations, and Canada, value reserve lands when considering future tenures.

Snaw-Naw-As First Nation v. Canada (Attorney General, 2021 BCCA 333 (September 14, 2021)

Summary

- The Snaw-Naw-As First Nation challenged whether a right of way for a railway that passed through their reserve lands should be terminated for lack of use.
- Snaw-Naw-As argued the tenure should end and that the meaning of “railway purposes” should be narrowly constructed.
- The court applied an objective test whether the lands were still needed for the authorized use. The owner’s intention to eventually use the lands again for railway purposes was relevant but not determinative.
- Based partly on owner’s active maintenance and feasibility studies on re-activating the line, the court agreed the tenure was still required.

Snaw-Naw-As First Nation v. Canada (Attorney General, 2021 BCCA 333

Significance

- Gives insight into how courts might interpret the hundreds (likely thousands) of tenures issued under the *Indian* Act "for as long as required".
- Courts will apply *Osoyoos v. Town of Oliver* to determine whether a tenure is actually a full grant of fee simple, or simply an easement for so long as required for the authorized purpose.
- Illustrates how a court analysed the scope of authorized uses, and the evidence needed to prove whether the lands are – in fact – still required for the authorized purpose.

Questions?

Thank you for attending

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