BC Court of Appeal affirms that the Province upheld the Honour of the Crown in William v. British Columbia (Attorney General), 2019 BCCA 74

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The Court of Appeal in *William v. British Columbia (Attorney General)*, 2019 BCCA 74affirmed a decision of the British Columbia Supreme Court, 2018 BCSC 1425, in which the lower court held that Her Majesty the Queen in right of the Province as represented by the Chief Inspector of Mines (the "Province") had satisfied the duty to consult.

The Province had approved the exploratory mining program (the "Decision") of a mining company, Taseko Mines Ltd. ("Taseko"). The Xeni Gwet'in First Nations Government and the Tsilhqot'in Nation (the "Petitioners") sought an order quashing the Province's Decision, arguing the Province had not satisfied the duty to consult. The trial judge declined to grant the petition. On appeal, the Court upheld that decision.

This decision is significant because it illustrates the approach courts will take when the Crown and Aboriginal rights holders fundamentally disagree such that reconciliation cannot be achieved.

Background

The Petitioners held proven Aboriginal hunting, trapping and trade rights throughout the area targeted by Taseko (roughly 125 square kilometres southwest of Williams Lake, the "Area"). Taseko proposes to develop a gold and copper mine in the Area and holds a mineral lease and mineral claims for this purpose. The Area may contain one of the largest undeveloped gold and copper deposits in the world.

Taseko commenced the parallel provincial and federal approval processes.

Taseko's original project in the Area was granted an environmental assessment certificate (the "Certificate") by the Province but rejected by the federal government due to adverse environmental effects. Taseko subsequently received provincial approval to engage in exploratory work in order to address the federal government's concerns as well as amend its existing provincial Certificate.

Taseko submitted a revised version of the project for federal approval. The federal government referred the project for review by an independent panel, which raised significant technical, environmental, and cultural concerns. On this basis, the federal government again rejected the project, and Taseko sought judicial review of that rejection decision.

In the meantime (i.e. pending the outcome of its application for judicial review of the federal decision), Taseko prepared a new exploratory program for provincial approval. The Tsilhqot'in Nation opposed this new program, as it was more extensive than the original exploratory program.

Consultations continued between the Province and the Petitioners for a number of years. However, the Province also became concerned that the time limit on Taseko's original Certificate would run out shortly, in 2020. The Province was also worried about the ultimate feasibility of the project given two rejections from the federal government. Taseko responded that the exploration work should go ahead notwithstanding the federal government's dissatisfaction with the project as a whole, and the Province need not wait for the results of Taseko's application for judicial review.

The Province ultimately approved the exploratory work, and the Petitioners sought judicial review of that decision. The Province's delegate (a senior mine inspector) provided 30 pages of reasons including a detailed review of 17 primary concerns raised by the Petitioners.

Following the release of the Decision, the federal government raised a concern as to whether the decision to approve the exploratory program undercut the second federal rejection. Ultimately, an injunction was granted preventing Taseko from launching the exploratory program pending the release of the court's reasons in this decision. In the meantime, the Federal Court rejected Taseko's judicial review of the federal government's decision to reject the project. Taseko has appealed that judgment to the Federal Court of Appeal.

The trial judge held that the Province's decision fell within the range of reasonable outcomes such that the honour of the Crown was maintained.

Judgment on Appeal

The Petitioners appealed trial judge's decision, arguing that the trial judge erred by (1) concluding the Province did not breach its procedural duty to consult; (2) upholding the Province's approval for the exploratory drilling based on a purpose which did not form any part of the consultation (i.e. to inform future environmental assessment applications); and (3) the substantive decision to approve the program did not fall within the range of reasonable outcomes.

In dismissing the first ground of appeal, the Court examined the conduct of the Province with regards to a breach of the procedural duty. The Court found that the senior mines inspector gave full consideration of the Appellants' concerns before making a reasonable decision.

In dismissing the second ground of appeal, the Court reviewed the trial judge's decision and found that the potential alternative use of the information which would result from

the exploratory drilling program was brought to the attention of the Petitioners during the consultation process, albeit not as the primary focus of the program.

Finally, the Court held that both rejection and approval of the program were reasonable in the circumstances. The chambers judge properly applied the standard of reasonableness. The fact that there was an honest disagreement about whether the project should proceed does not mean that the process was inadequate or that the Crown did not act honourably.

Implications

This decision shows that an honest and fundamental disagreement may exist between the Crown and Aboriginal rights holders such that reconciliation cannot be achieved. Such disagreement, without more, does not render the consultation process inadequate. The honour of the Crown may be upheld even when reconciliation cannot be achieved.

The Petitioners have sought leave to appeal the decision to the Supreme Court of Canada. In the interim, the British Columbia Court of Appeal granted a stay of its order pending the disposition of that application (2019 BCCA 112).

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