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Supreme Court of British Columbia Issues Injunction Restraining Exploration Activities Authorized by Provincial Permits

Jan 31, 2012 By Martin Ignasiak, Katherine M. Murphy, Daniel Yaverbaum

On December 2, 2011, the Supreme Court of British Columbia awarded Marilyn Baptiste, on her own behalf and on behalf of the members of the Xeni Gwet'in First Nation Government and the Tsilhqot'in Nation, an interim injunction restraining Taseko Mines Limited from carrying out exploration work authorized by two provincial permits.[1]

Despite recent direction from the Supreme Court of Canada, this case illustrates how there is still considerable ambiguity in the law regarding the content of the Crown's duty to consult. Specifically, it raises the issue of whether past and potential future events, which are not directly related to the Crown action that triggered the duty to consult, are relevant in determining the scope of consultation required.

The Facts

Taseko is the proponent of the Prosperity Project, a proposed open pit gold and copper mine (the Project). The Project was rejected by a federal environmental assessment review panel in 2010. In 2011, Taseko submitted a revised project description to the Canadian Environmental Assessment Agency, who again referred the revised Project to a review panel for assessment.

Marilyn Baptiste is the Chief of the Xeni Gwet'in, one of six bands that constitute the Tsilhqot'in Nation. The Supreme Court of British Columbia previously held that the Tsilhqot'in Nation has Aboriginal rights in the area within which the Prosperity Project is to be located.[2]

In October and November 2011, Taseko obtained two provincial permits authorizing it to carry out exploration work relevant to the engineering of the Project. Upon attempting to access the Project site, Taseko was faced with a blockade. The Xeni Gwet'in and Tsilhqot'in Nation (together, the "applicants") commenced judicial review proceedings seeking to quash the provincial permits on the ground that the Crown breached its duty to consult. The applicants also applied for an interim injunction restraining the activities authorized by the permits pending determination of the judicial review application.

The Decision

Mr. Justice Grauer concluded that the applicants had established a fair question to be tried. He refrained, however, from determining whether the Crown's focus solely on the work to be performed under the provincial permits was appropriate, or whether a deeper level of consultation was required. The Crown and Taseko argued that, given the restricted nature of the work authorized by the permits, the required consultation fell at the low end of the spectrum. In contrast, the applicants argued that the Crown was required to consider the cumulative impacts of years of exploration work and the future impacts of a full mining operation in determining the level of consultation required. The Crown's position finds support in the Supreme Court of Canada's decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*.[3] However, the recent British Columbia Court of Appeal decision in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*,[4] indicates that *Rio Tinto* may be distinguishable and, in some cases, an examination of the historical context and potential impacts of the Project as a whole may be appropriate when determining the level of consultation required.[5]

Justice Grauer also concluded that the balance of convenience favoured the applicants. The grounds upon which Justice Grauer made this decision include that:

1. the injunction was only sought for a relatively short period of time;

2. if the injunction is not granted, the applicants would lose their asserted right to deep consultation;

3. there is public interest in ensuring reconciliation of competing interests through consultation and accommodation; and

4. each new incursion into the lands upon which the applicants exercise their traditional rights constitutes irreparable damage.

Justice Grauer held that "if only a portion of the proposed new clearings and trails prove to be unnecessary, the preservation of that portion is vital". In contrast, Justice Grauer noted that the "ore bed is not going anywhere."[6]

In the result, Justice Grauer awarded the injunction, which is to remain in effect for up to 90 days, unless extended by the Court, and in any event for no longer than is required for the judicial review application to be heard.

The Implications

Like all injunction cases, this case is highly fact-specific. However, it does affirm that the Courts are keen to see that the consultation and accommodation process begins on the right footing. The Courts prefer that potential deficiencies in this process are addressed before the activities at issue are carried out, rather than after the fact, particularly in the case of large, contentious projects.

This case also highlights an area of law that requires further judicial clarification. In *Rio Tinto*, the Supreme Court of Canada was clear that the "subject of the consultation is the impact on the claimed rights of the *current* decision under consideration."[7] The recent case of *West Moberly* has injected a degree of uncertainty into this analysis by suggesting that *Rio Tinto* may be distinguishable in some cases. Leave to appeal to the Supreme Court of Canada has been sought in the *West Moberly* case.

If you have any questions on the implications of the subject matter of this Osler Update, or you wish to discuss further, please contact Martin Ignasiak, Katherine Murphy or Daniel Yaverbaum.

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[1] *Taseko Mines Limited v. Phillips*, 2011 BCSC 1675.

[2] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700.

[3] 2010 SCC 43.

[4] 2011 BCCA 247.

[5] *Ibid*, at paragraph 116, per Finch, C.J.

[6] *Taseko* at paragraphs 65-66.

[7] *Rio Tinto* at paragraph 53.