MILLER THOMSON LLP
Barristers & Solicitors, Patent & Trade-Mark Agents

ABORIGINAL LAW UPDATE

February 2006

Note:

This newsletter is provided as an information service to our clients and is a summary of current legal issues. These articles are not meant as legal opinions and readers are cautioned not to act on information provided in this newsletter without seeking specific legal advice with respect to their unique circumstances. Miller Thomson LLP uses your contact information to send you information on legal topics that may be of interest to you. It does not share your personal information outside the firm, except with subcontractors who have agreed to abide by its privacy policy and other rules.

Inside

SUPREME COURT OF CANADA FINDS A DUTY TO CONSULT IN RELATION TO TREATY LANDS: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*

Rosanne Kyle
Partner
Vancouver
rkyle@millerthomson.com

Ryan Morasiewicz
Student-at-Law
Vancouver
rmorasiewicz@millerthomson.com

On November 24, 2005, the Supreme Court of Canada handed down its reasons in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, finding that the Crown breached its duty to consult with the Mikisew First Nation on the construction of a winter road through Treaty 8 lands over which the Mikisew hunted and trapped. The circumstances, including the minor nature of the winter road, as well as the fact that it was on surrendered land on which the Mikisew's treaty rights were expressly subject to a "taking up" limitation, led the Court to conclude that the Crown's duty to consult was at the lower end of the spectrum. Nonetheless, the Supreme Court of Canada unanimously set aside the road approval on the basis that the Crown had not adequately consulted with the Mikisew.

Background

Members of the Mikisew First Nation are descendants of original signatories to Treaty 8, which covers approximately 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories. Pursuant to Treaty 8, the First Nations were promised reserves and other benefits including the rights to hunt, trap and fish throughout the land surrendered, except for "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

The Mikisew First Nation has a reserve within what is now Wood Buffalo National Park. In 2000, the federal government approved construction of a winter road through the reserve, without consulting the Mikisew. When the Mikisew objected, the federal government modified the road alignment to track around the boundary of the reserve, but once again failed to consult with the Mikisew.

Creation of such a road would result in a 200 metre wide corridor in the Park within which the use of firearms would be prohibited (for a total area of approximately 23 square kilometres). The road would also disrupt Mikisew trap lines running through the area. The Mikisew objected to the loss of their hunting and trapping lands and the negative impact the project would have on their culture and traditional lifestyle.

Supreme Court of Canada's Analysis

The Supreme Court of Canada held that all the parties to Treaty 8 contemplated that, from time to time, portions of the surrendered land over which the Mikisew had hunting, trapping and fishing rights would be "taken up" and such rights eliminated. However, even though the Crown had a treaty right to "take up" surrendered lands for transportation purposes, the Court ruled that the Crown was still bound by its duty to act honourably when taking up lands.

The Court held that Treaty 8 gave the Mikisew procedural rights (i.e. the right to be consulted) in addition to substantive rights (i.e. hunting, fishing and trapping rights). Thus, the Court considered the manner by which the "taking up" for the winter road was planned, and whether that process was compatible with the honour of the Crown. In this case, the proposed road would clearly have adverse effects on the Mikisew's hunting and trapping rights. Accordingly, the duty to consult had been triggered.

The Court noted that it was no answer to the Mikisew's concerns about the impact on their hunting rights to say that more distant areas within the Treaty 8 territory would be unaffected, or that the winter road corridor only affected a small portion of lands. The Court held that the Crown's Treaty 8 promises could not be fulfilled by Mikisew hunters and trappers "invad[ing] the traditional territories of other First Nations distant from their home". Accordingly, the Court found that a meaningful right to hunt could not be ascertained on a Treaty-wide basis. The Court further suggested that if the "taking up" of lands left a First Nation with no meaningful right to hunt over its traditional territories, the First Nation's Treaty rights would be infringed and the government action would have to be justified.

In this case, since the Crown was proposing to build a minor winter road on surrendered lands where the Mikisew's hunting, fishing and trapping treaty rights were expressly subject to the "taking up" limitation, the Court ruled that the Crown's duty to consult was at the lower end of the spectrum. The Crown was required to provide the Mikisew with notice of the project, engage directly with them in good faith, and attempt to address any concerns that may arise. As the Crown had not discharged these basic obligations in relation to the winter road, the Court set aside the Minister's approval of the road.

NEW LEGISLATION DEALING WITH ON-RESERVE COMMERCIAL AND INDUSTRIAL DEVELOPMENT PROJECTS NOW IN EFFECT

On November 25, 2005, Bill C-71, the First Nations Commercial and Industrial Development Act (the "Act"), received Royal Assent. This Act, developed in partnership by the Government of Canada and five partnering First Nations (Squamish Nation of British Columbia, Fort McKay First Nation and Tsuu T'ina Nation of Alberta, Carry the Kettle First Nation of Saskatchewan and Fort William First Nation of Ontario), enables the federal government, at the request of a First Nation, to enact regulations for complex commercial and industrial development projects on reserve land.

As the federal government has exclusive jurisdiction to make laws in relation to Indian lands, some provincial regulatory laws do not currently apply on a reserve to the same extent as elsewhere in a province. Regulations made under the Act will address this regulatory gap by allowing the federal government to essentially replicate provincial regulatory regimes for developments that take place on reserve. Compatibility with an existing provincial framework will then lead to more certainty for investors and developers of major aboriginal commercial and industrial business opportunities.

This legislation is optional for First Nations. Federal regulations will only be implemented under this Act at the request of participating First Nations. These regulations will be project-specific, developed in cooperation with the First Nation and the province, and will be limited in application to the particular lands at issue. The regulations will also allow the government to have the province carry out the monitoring and enforcement of this new regulatory regime through an agreement between the federal government, the First Nation and the province.

All five partnering First Nations have plans for various commercial or industrial projects on their reserves. These projects will allow the First Nations to develop their economics, create jobs and increase self-sufficiency.

NEW LEGISLATION RECOGNIZING FIRST NATION GOVERNMENTS STILL UNDER CONSIDERATION

On November 24, 2004, Bill S-16, the First Nations Government Recognition Bill was introduced in the Senate by Hon. Gerry St. Germaine. Bill S-16 is an Act for enabling legislation to provide for the acknowledgement and recognition of First Nation governments within Canada, without the need for negotiation of further treaties or agreements with the federal or provincial governments.

Bill S-16 provides for a process whereby recognized First Nation communities can opt to come under its provisions. For this to occur, a referendum must be held on the subject, and the proposal (including a Constitution and provisions for accountability and limits on law-making powers of the First Nations government) must be put before the electors. If at least two-thirds of the electors vote in the referendum, at least two-thirds of those who vote approve the proposal and the resultant number approving the proposal is at least 50 percent of all the electors, then the First Nation becomes recognized as a self-governing political entity. Once this occurs, the Bill also provides for First Nation management of First Nation's lands and finances.

Although Bill S-16 is designed to recognize the jurisdiction of First Nations to legislate in specified fields, the law-making power of a recognized First Nation is limited by a number of provisions: it will only be applicable to lands of the First Nation, it will not override federal laws that relate to compelling legislative objectives that are consistent with the fiduciary relationship between Crown and aboriginal peoples, it may be limited by the First Nation's Constitution, it will be specifically limited in certain areas (for example, the environment) and the penalties that may be established are limited. A recognized First Nation, however, will have exclusive jurisdiction over its own laws in relation to the laying of charges and the prosecution of persons who contravene its laws.

On February 22, 2005, Bill S-16 was referred to the Standing Senate Committee on Aboriginal Peoples, which continues to hold hearings on the substance of the Bill.