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Emerging Precedents in Consultation and Accommodation in Canada

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Introduction

The new reality of resource development in Canada is that Aboriginal communities must be engaged from the get-go. That much most everyone agrees on. After that, it gets much murkier. How does consultation play out when the impacts have already occurred and the decision at hand will not change those impacts? Who should engage the Aboriginal communities: the government, industry, or both? Who decides whether the engagement was sufficient to meet the duty to consult and accommodate? And how will the duty to consult and accommodate be treated in a modern treaty context?

In this paper we canvass some recent cases addressing these questions. We then move on to consider best practices for exploration agreements and IBAs, and to look at the Crown's role in consultation and accommodation with reference to a recent initiative in Ontario: the revised exploration process under the new (since 2009) *Mining Act*.

1. Recent Case Law Developments

There has been a recent proliferation of case law surrounding the Crown's duty to consult and accommodate. The basics of the picture, though, have not changed significantly, although the recent court decisions have fleshed out certain details about how the duty will apply.

The Supreme Court of Canada's seminal decision in *Haida Nation v British Columbia (Minister of Forests)* established that the Crown has a duty to consult and accommodate an Aboriginal community where it is aware of proven or claimed Aboriginal rights or interests.[1] Where the claim to a right or interest is weak, and the impact on the right or interest is not significant, the duty to consult and accommodate is low, and may be satisfied by merely giving notice and engaging in discussions.[2] On the other hand, where the claim to a right or interest is strong, and the impact of the proposal is high, the duty to

[1] 2004 SCC 73 ("*Haida Nation*"), para. 35.
[2] *Ibid.* para. 43.

consult and accommodate is conversely high.[3] The duty to consult and accommodate is a constitutional obligation[4] and therefore applies to every statutory decision-maker. It applies even to Crown decisions at the level of strategic planning.[5]

Haida Nation left certain major questions unanswered, to which recent case law has provided some guidance. These questions include, first, how would the courts consider the nature of the impacts on the Aboriginal rights or interests, and what role would historical impacts on those rights and interests play in the analysis? Second, who within the Crown's governmental apparatus is responsible for discharging the duty to consult and accommodate, and can the duty be delegated to other bodies? Third, how does the duty apply to existing, proven Aboriginal rights and interests?

Construing Impacts

In *Haida Nation*, the Crown decision being impugned by the First Nation was the renewal of a licence to harvest trees within a certain area, and the transfer of that licence from one large forestry company to another. This was a decision that the Court found to have a potential impact on the rights of the Haida. Although much was made in the reasons for judgment about the longstanding opposition of the Haida to this kind of logging,[6] and of the potential that by the time litigation finally resolves the strength of their claim, that they would find their homeland denuded of trees through cumulative impacts of logging,[7] it was not immediately clear what role these factors played in the Supreme Court's reasoning.

The Supreme Court's recent decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* has given important guidance on this issue.[8] In that case, Alcan had dammed the Nechako River in British Columbia in the 1950s, redirecting the flow of the Nechako to another river, then out to the Pacific Ocean. The dam had major impacts on the fisheries of the respondent First Nations. Alcan sold excess electricity from the dam to BC Hydro, through an Energy Purchase Agreement ("EPA") that was only valid with the approval of the BC Utilities Commission. In 2007 it sought approval for an EPA that would have provided for excess electricity sales through 2034. The Commission was empowered by statute to consider "any other factor that the commission considers relevant to the public interest"[9]. The Commission ruled that any failure to consult was irrelevant to its decision, since no duty to consult was engaged. It reached this conclusion by deciding that its decision on the 2007 EPA would have no adverse effects on the interests of the First Nation.[10] It held that "the 2007 EPA would have no physical impact on the existing water levels in the Nechako River", make no change to the current management of the

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[3] *Ibid.* para. 44.
[4] *Ibid.* para. 25.
[5] *Ibid.* para. 76.
[6] *Ibid.* para. 65.
[7] *Ibid.* para. 33.
[8] 2010 SCC 43 ("*Carrier Sekani*").
[9] *Ibid.* para. 7.
[10] *Ibid.* para. 14.

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fishery, and would have no adverse impact on pending claims and rights of the First Nation.[11]

The Supreme Court agreed with the Commission, and through its reasons in this case, expanded on the doctrine of what kind of impacts trigger the duty to consult. Notably, it rejected the "no physical impact" standard used by the Commission, stressing that "high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no 'immediate impact on lands and resources'"[12]. The Court held that "[t]he claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice."[13] The Court continued: "An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult."[14] And further on: "The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right."[15]

Whether the *Carrier Sekani*'s formulation is a viable one, of course, depends on one's understanding of "novel". It is true, after all, that the 2007 EPA was a "novel" agreement, and that without it, the electricity sales could not have legally continued. If the electricity sales ceased, would it not have been more likely that the dam would be decommissioned, and the rivers returned to their pre-damming flows, and in turn, it would have been more likely that the First Nation's fishing rights would have been restored? With the 2007 EPA, this possibility of decommissioning is put off for another few decades. Nonetheless, the Court obviously believed that this was incontrovertibly not a "novel" adverse impact.

The trickiness of this standard can be seen in its application in *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, the only Court of Appeal decision so far to apply the new *Carrier Sekani* standard for determining which impacts trigger the duty to consult.[16] In that case, the First Nations, signatories to Treaty 8, had a preferred traditional hunting area where First Coal proposed to engage in exploratory drilling.[17] The treaty recognized their right to hunt. The preferred hunting area was inhabited by the Burnt Pine caribou herd, whose population had declined to 11 animals; since the 1970s West Moberly elders had imposed a ban on hunting the Burnt Pine herd in order to

[11] *Ibid.* para. 16.
[12] *Ibid.* para. 47. Note that this leaves open the question of whether governments have a duty of consultation when revamping legislative regimes dealing with resource activity.
[13] *Ibid.* para. 45.
[14] *Ibid.* para. 48.
[15] *Ibid.* para. 49.
[16] 2011 BCCA 247 ("*West Moberly*").
[17] *Ibid.* para. 21.

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increase its chances of survival.[18] There is evidence that the Burnt Pine herd was decimated at least in part by the construction of the massive W.A.C. Bennett and Peace Canyon dams, which created a large reservoir on territory the herd used to traverse.[19] The extent of the Crown's consultation in this case, in its decision to authorize the exploratory drilling, was challenged by the First Nations.

The trial judge in the matter held that the consultation was not sufficiently meaningful. He considered the past impacts on the Burnt Pine herd in reaching his decision. This was impugned by the appellant mining company. The Court of Appeal affirmed the trial judge's decision, distinguishing the case from *Carrier Sekani*. The Court held that the trial judge properly considered the poor health of the caribou herd and the possibility of the herd's restoration and rehabilitation. It held: "To take those matters into consideration as within the scope of the duty to consult, is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs."[20]

The Crown has sought to leave to appeal the *West Moberly* decision to the Supreme Court of Canada. The Court has not yet decided on whether to grant leave.

Significantly, it is notable that while *Carrier Sekani* seemed to shut the door on the availability of a *Haida Nation* order for the duty to consult and accommodate for prior failures to consult, it did open the door to the availability of damage awards against the Crown for past and continuing breaches.[21]

Delegating the duty

In *Haida Nation*, one of the issues the Supreme Court had to deal with in laying out the duty to consult and accommodate was whether the proponent had a duty to consult and accommodate. The Court held that it did not, saying that "[t]he Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests."[22] However, "[t]he Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments."[23]

Carrier Sekani, whose facts have already been referenced above, provides significant guidance on how delegation affects the duty to consult and accommodate. Significantly, it established a distinction between two different kinds of determinations, that we will label here "the consulting role" and "the reviewing role".

We understand "the consulting role" to be what is described by the *Carrier Sekani* decision as "the Crown's duty to consult" proper. The Court states: "it is open to

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[18] *Ibid.* para. 26.
[19] *Ibid.* para. 111.
[20] *Ibid.* para. 119.
[21] *Carrier Sekani*, *supra* note XX, at para. 49.
[22] *Haida Nation*, para. 53.
[23] *Ibid.*

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governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource."[24]

We understand "the reviewing role" to be what the Court describes as "determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand."[25]

According to *Carrier Sekani*, a tribunal may have neither of these duties, one of them, or both of them.[26] (Although the language of the decision speaks of "tribunals" only, there does not seem to be anything about the logic of the decision that would restrict its application to tribunals specifically rather than any person with delegated authority.) To determine what kind of powers have been delegated to the tribunal, one is to look to the powers expressly or implicitly conferred on it by statute.[27] The standard of consultation and accommodation to which a Crown delegate will be held, then, seems to be a product of statutory interpretation and contextual analysis, and will not be entirely clear at the outset.

Carrier Sekani continued by further consigning the content of the duty to consult and accommodate to contextual analysis. Merely because statute has given a tribunal the power to determine a question of law, the Court said, does not mean that they have the power and the duty to consult and accommodate. The Court held: "Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation."[28]

The Court continued: "A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute."[29]

The Court then seemed to suggest that there may be situations where the legislature itself can fail to discharge the duty to consult and accommodate. It said: "If the tribunal structure set up by the legislature is incapable of dealing with a decision's

[24] *Carrier Sekani*, para. 56.
[25] *Ibid.* para. 57.
[26] *Ibid.* para. 58.
[27] *Ibid.* para. 60.
[28] *Ibid.*
[29] *Ibid.* para. 61.

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potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts."[30]

At the end of the day, there seems to be a few bright line rules that we can take away from the otherwise contextual approach in *Carrier Sekani*. First of all, the duty to consult and accommodate is a duty of the Crown, and however delegation is structured, some part of the Crown must be answerable to the duty. Whoever is empowered to engage in the consulting role has the duty to consult, and if so empowered, accommodate. Whoever is empowered to engage in the reviewing role has the duty to review the quality of the consulting that has been done, and if so empowered, accommodate. The final rule is perhaps the most intriguing: whoever is empowered to determine the structure of the mechanism of consultation and accommodation is obliged to do so in such a way that the Crown's delegates have the authority to consult and accommodate, and to do so adequately.

Carrier Sekani, therefore, seems to clear the air and establish three distinct ways to challenge the Crown on its duty to accommodate: (1) in the consulting role, that is, a failure to consult and accommodate; (2) in the reviewing role, that is, a failure to correctly determine whether the delegate in the consulting role has discharged its duty to consult and accommodate; and (3) in the structuring role, a failure to organize the mechanisms for consultation and accommodation to adequately deal with a decision's impact on potential Aboriginal interests.

This schema for understanding the duty to consult and accommodate is a novel development in *Carrier Sekani* and attention should be paid to its impact in upcoming case law.

Application to existing, proven rights and interests

In *Haida Nation*, the Supreme Court noted the wide applicability of the duty to consult and accommodate, when it stated:

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and <u>continues beyond formal claims resolution</u>.[31]

A year after *Haida Nation*, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* had already decided that the goal of reconciliation meant that the duty to consult and accommodate extends past the formation of a treaty relationship between the Crown and an Aboriginal community, and applies to rights that arise out of the treaty.[32] In *Mikisew*, the Crown was contemplating activity in which it would have used its powers under the "taking up" clause in Treaty 8 to take land away from the

[30] *Ibid.* para. 63.
[31] *Haida Nation*, *supra* note XX, at para. 32. Emphasis added.
[32] 2005 SCC 69 ("*Mikisew*").

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inventory from which the First Nation could hunt and trap. The Court rejected the Crown's argument that since this was land that had already been surrendered in a treaty, that it was empowered to do what it liked with it.[33] On the contrary, the Court held that the process of implementation of Treaty 8 itself obliged the Crown to act honourably, and therefore to consult and accommodate a known Aboriginal interest.

Two recent Supreme Court decisions have affirmed that it will apply this logic to modern day treaties and land claims agreements as well: *Quebec (Attorney General) v Moses*,[34] and *Beckman v Little Salmon/Carmacks First Nation*.[35] *Moses* was not centrally about the duty to consult and accommodate, but about how to construe a modern day treaty in the context of the constitutional division of powers between federal and provincial legislatures. Interestingly, though, it stated that the federal Crown's exercise of power is bound by the *Haida Nation* duty to consult where it affects the rights of the Cree under the James Bay Treaty. The Court stated that the federal statute "must be applied by the federal government in a way that fully respects the Crown's duty to consult the Cree on matters affecting their James Bay Treaty rights in accordance with the principles established in *Haida Nation* […]"[36].

In *Little Salmon/Carmacks*, the First Nation had entered into a land claims agreement with the federal and Yukon governments in 1997.[37] The agreement provides for the Crown to take up some of the traditional lands of the First Nation for various purposes, including agriculture.[38] A Larry Paulsen had applied to the territorial government for a grant of Crown land for setting up a farm.[39] The Yukon government took the position that it had no duty to consult, but that it would engage in some consultation of the First Nation out of courtesy.[40] It approved the Paulsen application. The First Nation applied to have the decision quashed for failing to adequately consult them.[41]

The Court held that the Yukon government did indeed have a duty to consult – that consultation was no mere courtesy, but it held that the consultation in this case was sufficient to discharge the duty.[42] Importantly for the case law in this area, it rejected the territorial government's argument that the land claims agreement was a "complete code" that exhausted the rights of the First Nation signatories, in spite of the presence of an "entire agreement" clause in the land claims agreement.[43] Rather, the Court held that "[i]f a process of consultation has been established in the treaty, the scope of the duty to

[33] *Mikisew*, para. 49-50.
[34] 2010 SCC 17 ("*Moses*").
[35] 2010 SCC 53 ("*Little Salmon*").
[36] *Moses*, para. 45.
[37] *Little Salmon*, para. 2.
[38] *Ibid.* para. 4.
[39] *Ibid.* para. 3.
[40] *Ibid.* para. 26.
[41] *Ibid.* para. 4.
[42] *Ibid.* para. 72ff.
[43] *Ibid.* para. 52, 62, 68.

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consult will be shaped by its provisions."[44] It stated that "[t]he LSCFN Treaty *is* the 'entire agreement', but it does not exist in isolation. The duty to consult is imposed as a matter of law, irrespective of the parties' 'agreement'. It does not 'affect' the agreement itself. It is simply part of the essential legal framework within which the treaty is to be interpreted and performed."[45]

Moses and *Little Salmon* represent two of the first cases involving the interpretation of modern treaties to go to the Supreme Court. The Court seems prepared to read the treaties in the context of new doctrinal developments in the rights of Aboriginal peoples, and it seems that modern treaties or land claim agreements will be read neither like historical treaties nor garden variety commercial contracts. Rather, the doctrinal basis of Aboriginal law will affect their interpretation in some way.

2. Best Practices in Exploration Agreements and IBAs

The Crown interposing itself between Aboriginal communities and non-Aboriginal private interests is at least as old as the Royal Proclamation of 1763.[46] Yet in this day and age there is no reason for proponents to be trapped by outmoded practices, and plenty of reasons for them to approach Aboriginal communities directly for negotiations towards agreements on their exploration and extraction activities. In fact, as most companies know, relying solely on the Crown to engage in consultation and accommodation is highly risky. There have frequently been consultation failures by Crown officials, and these have sometimes led to litigation, and delays for the project. If the company can secure the consent of the Aboriginal community through a direct agreement, then it can largely mitigate this risk.

First, let us go through some terminology. An "exploration agreement" is an agreement on a project that has not yet reached commercial production, and is usually entered into by a resource company and an Aboriginal community. It covers issues related to exploratory undertakings like test-drilling and the attendant environmental permits and procedures.

A good exploration agreement will presage a full-fledged impacts and benefits agreement (IBA), which is usually an agreement between a resource company and an Aboriginal community on the full project development. It is similar in kind to an exploration agreement – it covers many of the same topics – but it is far more complex and negotiations for it are a much longer process. An IBA is an explicit recognition by the resource company that its activities will have impacts on Aboriginal and treaty rights, claims, and interests. In return, the Aboriginal community gives some form of consent to the project, and gets in return from the resource company certain benefits.

All exploration agreements and IBAs should address, at a minimum, the following topics, with the detail appropriate to the context and stage of the project:

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[44] *Ibid.* para. 67.
[45] *Ibid.* para. 69.
[46] See, generally, *Guerin v The Queen*, [1984] 2 SCR 335.

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- Financial compensation – in exploration this may be a portion of exploration expenditures or a per-drill-hole fee, and for an IBA this may take the form of profit sharing, a revenue stream, fixed payouts, or some other kind of payment

- Ownership – in which the Aboriginal community gains an equity stake in the project, possibly accomplished through share transfers, options, formation of joint ventures or other means

- Preferential hiring – where members of the Aboriginal community are preferred over other candidates for all project-related jobs

- Preferential procurement – where the resource company and its subcontractors give bidding preference to businesses with ties to the Aboriginal community

- Education and training programs – where the resource company contributes to programs such as on-the-job training, apprenticeships, wage supplements, summer jobs for students, scholarships, etc.

- Environmental Protection, Mitigation Measures and Monitoring – where the resource company can keep the community informed about the impact on the land, and where the community can specify which sites should be protected, and how impacts can be mitigated, and establish processes for monitoring and enforcement of environmental measures

- Working conditions – where the community can negotiate for specific conditions that can make it easier for members to work at the project, such as the use of Aboriginal language at the workplace, off-time coordinated with seasonal traditional activities, and/or the presence of an elder at the worksite to counsel workers

- Social or cultural support – the company will fund certain social or cultural activities, such as language programs or the construction of an elders' centre. This may be especially advantageous where the community can obtain goods or services at "wholesale" prices; for example where it is negotiating with a construction company, it may be able to get compensation in the form of community infrastructure at lower prices

To negotiate these agreements, all parties are wise to consider a few basic principles:

Be Prepared

The process for decision-making in Aboriginal communities requires ample time to build consensus, while preserving community harmony. Rushed decisions can polarize a community and result in long-term damage to the proponent-First Nation relationship, doing great damage to the proponent's chances for success.

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By leaving enough time for relationships to develop, the proponent will be able to determine what sort of Aboriginal community it is dealing with. Some Aboriginal communities are highly sophisticated when dealing with development projects, and will have a stable of businesses ready for action and members ready to fill jobs. This is certainly the case, for instance, in the tar sands areas in Alberta. But for First Nations that have been largely undisturbed in their lands, this capacity may not yet exist. Engaging with a community as if it does will be an exercise in frustration. Rather, the proponent and Crown need to determine where the capacity needs lie, and develop cooperative strategies with the First Nation to meet them. One example of this approach is ‘front-ending’ the training and business opportunities negotiations – that is, doing them first and flowing payments on them before the negotiations are complete, in order to ensure that as the project needs ramp up, the Aboriginal community is ready to respond.

Know Who You’re Dealing With

It is important for both sides to get a sense for what motivates the other side in a negotiation. This will help you understand the interests behind the other side’s position. From the perspective of an industry proponent, it will be especially useful for you to gain an understanding of the worldview of the community you are dealing with. For instance, if your proposed project is to involve interference with the burial ground of a community, you might want to get an understanding of how the community understands its relationship with its ancestors. Would proposing moving the burial ground be a reasonable proposal, or would it lead the other side to take offence and unintentionally crater the negotiation? Cultural difference is a reality in this line of work and it is important not to go in to a negotiation assuming that the other side will have the same cultural values and assumptions as yourself.

Ensure the Aboriginal Community has the Necessary Advice and Assistance

Negotiation are complex things that take time, money, and human resources – all of which are in short supply for many First Nations. No company, or Crown party, would enter into these kinds of negotiations without at team in place and expert advice, and no Aboriginal community should be asked to do so either. So it is essential to the integrity of the process that Aboriginal communities have the capacity to fund a negotiating team, and retain the appropriate independent environmental, legal and other technical experts. These teams (and technical experts) give the negotiations a focal point, and they are often able to assist in communicating the community’s positions and knowledge in terms that company and Crown officials are quickly able to understand, and process into action and responses.

It remains an open question whether industry or the Crown should pay for this. Seeing as both parties have a stake in the outcome, it seems wise that they work out that question quickly. In practice, usually the company contributes funding toward the community’s negotiating costs and the retention of experts. It helps smooth relations with the community, since it is the proposed project that is disrupting the lives of people in the community, and the community should not be asked to spend precious resources on retaining experts. And by funding a meaningful and thorough consultation, the company

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can also avoid future disputes over whether the consultation process was sufficient, or whether the agreement has been tainted by unequal bargaining positions. (While the Crown is also at risk of these kinds of disputes, and for the same reasons, it is not the Crown that faces bankruptcy if a project fails due to poor First Nation consultation, which may explain why most companies are willing to simply layer these expenses into their cost of doing business.)

3. Crown Obligations and Arrangements

As discussed above, the obligations of the Crown are a complex matter, involving contextual analysis of the decision at hand, the decision-making regime, and the history of the claim or right at stake. That said, what most First Nations would assert (and probably most proponents as well) is that the Crown's performance of these obligations has been spotty and could use improvement.

Given that control over resource extraction is largely the purview of the provinces, the legislative and regulatory regimes that most effect First Nations are frequently provincial ones. Various provinces have addressed their duties in differing ways. In this section, we take a closer look at one initiative recently been brought forward by the government of Ontario to address the consultation and accommodation gaps within the mining process: Ontario's newly-revised *Mining Act.*[47]

The revisions to Ontario's *Mining Act* were brought forward in 2009, largely as a result of the pressure placed on the Ontario government during the Platinex-KI dispute, in which the Chief and Council of a northern First Nation in Ontario were put in prison for six months for contempt of court after refusing to comply with a court order allowing mineral exploration to resume on their traditional territories.[48] During that dispute, the weakness of Ontario's mineral exploration regime was thrown into stark relief. There were few legislative or regulatory mechanisms by which Ontario could insert itself into the conflict between the First Nation and the exploration company, and either prevent the company from proceeding, or make arrangements that suited the First Nation. The hope for many First Nations was that Ontario's revisions to the *Mining Act* would fix this gap, and ensure that Ontario's laws left room for the exercise of First Nations jurisdiction and decision-making authority in their homelands.

Ontario's revised *Mining Act* took some steps towards involving First Nations in the decision-making process, though it has, by some reports, fallen short of what many First Nations had sought. Under the new rules (which will come into effect at a later date, once the regulations are drafted and passed), low-impact exploration cannot take place without an "exploration plan" being filed first. Low-impact will likely include most activities

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[47] Mining Act, R.S.O. 1990, CHAPTER M.14. Available online at <http://canlii.org/en/on/laws/stat/rso-1990-c-m14/latest/rso-1990-c-m14.html> (date accessed: October 12, 2011).

[48] In the interest of disclosure, we should point out to readers that our firm, OKT, was counsel to KI for large portions of that dispute, and has also represented First Nations for many years in discussions with Ontario on the revisions to the *Mining Act*.

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short of drilling and trenching, including hand-held drills. Exploration plans must meet set requirements "including any Aboriginal community consultation that may be prescribed" by Ontario. (s. 40) First Nations can review the exploration plans and bring objections to Ontario's attention prior to work commencing.

Medium and high-impact exploration (drilling, trenching, blasting, etc.) cannot take place without the proponent applying for and receiving a permit from Ontario. First Nations can review permit applications and suggest terms and conditions, can bring objections to a permit being granted, and can judicially review a decision to grant a permit. In deciding whether to approve a permit, Ontario must consider "whether Aboriginal consultation has occurred in accordance with any prescribed requirements, which may include consideration of any arrangements that have been made with Aboriginal communities that may be affected by the exploration." (s. 40)

The new *Mining Act* also allows Cabinet to make regulations requiring consultation with Aboriginal communities in the prescribed circumstances and governing all aspects of Aboriginal consultation under the Mining Act, including the manner in which any consultation that may occur under the Mining Act is to be conducted and providing for the delegation of certain procedural aspects of the consultation. This delegation is likely to involve most direct communication with the First Nations on project-related issues.

The revisions to the *Mining Act* also enshrined a right for Ontario to 'withdraw' sites from mineral exploration and staking if those sites have 'cultural significance' to a First Nation, and/or impose 'surface restrictions' on already-staked sites if the First Nations requests it.

Unfortunately, nowhere in Ontario's new system is there a requirement for written agreements with First Nations, though such agreements can be taken into consideration by officials when determining permits and other approvals.

The new system in Ontario does create some opportunities for Aboriginal communities to participate in the exploration approvals process, but a great deal will depend on how it is actually put into effect. For instance…

- Ontario has said that the plans and permits regime will mostly be 'paper-based' – meaning that large documents will be communicated to First Nations, who will then be expected to process them within strict timelines. But the majority of the First Nations members do not speak English or French as a first language, and many community members, particularly elders, do not have fluency in written English or French. It remains to be seen whether a paper-based system will be useful for First Nations, or be viewed as an external imposition, disrespectful of the community's oral and consensus-based culture. There is the possibility that over time, expertise can be built up at a community level that will lessen this problem somewhat.

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- If the system has short timeframes within which a First Nation can respond to a proposed exploration plan or permit, much of the advantage may be lost in the scramble to meet the deadlines. In a similar vein, if the plans and permits are for excessively long periods of time and cover a wide range of activities, they may be so vague as to fail to provide useful information for First Nations to base their decisions on. One can easily imagine a scenario where, after a too-short window for the First Nation to comment, a company gets a four-year permit for drilling over a large area, and then turning up four years later to drill, only to be met with strong resistance from the First Nation community. There is at least some chance this could happen; Ontario's latest proposals have floated the idea of a 45-day comment period on a permit, and a four-year duration for permits for a 'flexible' series of activities, including drilling.

- If the system does not properly distinguish between permitted and non-permitted activities, there could be a failure to adequately protect key values such as archaeological sites (burials, etc.). For instance, stripping of overburden would destroy archaeological values, but at the moment Ontario does not propose to require permits for it.

- Capacity funding has to be adequate to allow meaningful participation by First Nations. The exploration plan and permit review periods will likely be two months or less, meaning that First Nations will need to be able to respond quickly, and potentially to more than one application at the same time. Building a system that is scalable in this way, while remaining respectful of the autonomy of First Nations, will be very difficult.

- The role of the Crown remains somewhat elusive in this system. Indications are that Ontario will play a distribution role, disseminating the information to the First Nations and potentially gathering comments back. And Ontario's mining officials may perform some informal mediation role where there is tension between a First Nation and a company. But it does not appear as though Ontario will take on much direct participation in First Nations-proponent discussions, leaving Ontario open to accusations that high-level strategic discussions are being foreclosed. It also remains unclear who will decide if consultation has been sufficient, or whether such decisions will be made with written reasons or some other formal process in place.

- The withdrawals of sites may work to defuse certain flashpoints, but the indications are that withdrawals will be pinpoints only, perhaps up to 12 hectares max. Those with knowledge of the north know that sacred and significant areas are frequently much, much larger than 12 hectares – the important sites are in the thousands of hectares or more, comprising clusters of burials and other important ceremonial areas, etc. For instance, the KI dispute centered on Nemeguisabins Lake, a very large body of water close to the community. The withdrawals piece as proposed by

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> Ontario would be near to useless in such a situation. In fact, in the KI dispute, Ontario eventually bought out the company and withdrew a much larger area from mining to resolve matters – virtually the whole of the lake, plus more. Seeing as this is one of the few success stories Ontario has to hand, it leaves one wondering why Ontario did not provide for a more robust withdrawals mechanism.

Overall, Ontario's revisions to the *Mining Act* leave much still to be determined, as the regulations are drafted and the system is actually put into practice. It will be worth paying close attention over the next years to see whether the system can adequately include First Nations in the decision-making process, and ensure the Crown has met its obligations to consult and accommodate. As discussed here, while Ontario's new process is an improvement, there are still reasons to be concerned that it will fall short, and result in further confrontation, litigation and delayed or cancelled projects.

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