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In Pausing Taseko's New Prosperity Mine Exploration Program BCCA Recognizes Unsettled Questions Relating to the Duty to Consult; Consent and Justification Analysis and Proven Aboriginal Rights

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Case Commented On: *William v British Columbia (Attorney General)*, 2019 BCCA 112 (CanLII)

On April 1, 2019, the British Columbia Court of Appeal (BCCA), in *William v British Columbia (Attorney General)* granted Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and the Tsilhqot'in Nation (the Applicants), a stay of an order allowing an exploratory drilling program in relation to the New Prosperity Mine Project to proceed pending the outcome of an application for leave to appeal to the Supreme Court of Canada (SCC). The application for leave to appeal relates to a petition for the judicial review of a Notice of Work Approval granted to Taseko Mines Limited (TML) by the Province of British Columbia on July 17, 2017 allowing the exploratory drilling work to proceed. Chief William's petition for judicial review of the Approval was dismissed by a chambers judge (*William v British Columbia*, 2018 BCSC 1425 (CanLII)) who found that the Province's decision was reasonable and that the Province's consultation process and degree of accommodation had maintained the honour of the Crown. On March 1, 2019, the BCCA (*William v British Columbia (Attorney General),* 2019 BCCA 74 (CanLII)) agreed with the findings of the chambers judge and dismissed Chief William's appeal.

In reaching a decision that the stay should be granted, and specifically that the Applicants have met the merits test, Justice Bruce Butler rejects TML's argument that this is just another duty to consult case applying a long line of settled law. In so doing, Butler JA recognizes that the law relating to sufficiency of consultation and accommodation, the role of consent, and the justification analysis from *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 (CanLII) is unsettled when proven s 35 Aboriginal rights are at issue.

Background

Most readers will be familiar with long standing controversy around TML's proposal to develop the New Prosperity Mine Project . The proposal is controversial for two reasons. The first point of controversy surrounds the environmental impacts associated with the project, and the disparate outcomes accompanying provincial and federal environmental assessment (EA) processes.

The second point of controversy relates to the fact that the New Prosperity Mine Project is situated within an area throughout which the Tsilhqot'in Nation hold proven Aboriginal hunting,

trapping and trade rights (*Tsilhqot'in Nation v BC*, 2007 BCSC 1700, aff'd 2012 BCCA 285 (CanLII) and 2014 SCC 44 (CanLII)). In addition to hunting and trapping, the Tsilhqot'in conduct fishing, gathering, and spiritual and ceremonial activities within this area. The area is also a resting place for a number of the Tsilhqot'in peoples' ancestors. As other areas within the Tsilhqot'in territory become more developed, the area is also "increasingly critical" to maintain their culture and exercise their rights. In addition to proven Aboriginal rights, the Crown has also conceded that the Tsilhqot'in Nation has "strong *prima facie* claims to fishing and gathering rights and to pursue ceremonial and spiritual activities in the Area as a place of unique and special significance for the Tsilhqot'in cultural identity and heritage" (2019 BCCA 74 at para 5).

The original Prosperity Mine proposal (Original Project) would have significantly impacted two lakes and a large area adjacent to the lakes in the area subject to the rights of the Tsilhqot'in people: Teztan Biny (Fish Lake) would have been drained and filled with waste rock; and Y'anah Biny (Little Fish Lake) and Nabas (the surrounding area) would be inundated to create the tailings pond facility (at para 7). A revised proposal (New Prosperity Project), preserved Teztan Biny while still inundating Y'anah Biny and much of Nabas (at para 9).

The Original Project was subject to separate provincial and federal environmental assessments (EAs). Following a provincial EA recommending approval of the Original Project, on January 14, 2010 the province issued an EA certificate permitting TML to proceed. However, on the basis of EAs conducted under the now repealed *CEAA 1995* (see report here) and *CEAA 2012* (see report here), the Original Project and the New Prosperity Project were respectively turned down by the federal government. Unlike the provincial EA, which had concluded that the Original Project would not have significant adverse impacts on Tsilhqot'in hunting and trapping activities, and only minimal impacts on Tsilhqot'in fishing rights, the federal EAs concluded that the Original Project would have significant adverse effects on proven and asserted Aboriginal title rights in the area and that the New Prosperity Project would have significant adverse effects on the exercise of Aboriginal rights in the area.

TML challenged both the federal panel report and the federal government's rejection of the New Prosperity Mine Project. The Federal Court's decisions dismissing these challenges (2017 FC 1099 (CanLII) and 2017 FC 1100 (CanLII)) are both currently on appeal to the Federal Court of Appeal.

Meanwhile, in 2016 TML submitted a Notice of Work (NoW) application to the province, pursuant to the provincial EA Certificate granted in 2010 (which was extended for five years on January 14, 2015), to undertake an exploratory drilling program. The drilling program is necessary to advance the permitting process to allow construction of the mine in accordance with provincial legislation should the New Prosperity Mine Project receive federal approval. Time is a factor as TML's provincial EA Certificate will expire on January 14, 2020, if construction on the mine has not been "substantially started" by that date (at para 13). If the EA Certificate lapses, TML would need to seek a new provincial EA if it wishes to continue forward with the New Prosperity Mine Project, although its mineral lease and mineral claims continue until at least 2035.

While the 2016 Drilling Program will not affect the land over which the Tsilhqot'in hold recognized Aboriginal title, it will impact approximately 0.04% of the Tsilhqot'in's traditional territory as recognized by the Province in the Tsilhqot'in Stewardship Agreement. The Tsilhqot'in Nation takes the position that no work should be done unless and until federal approval is obtained. On April 18, 2017, the Tsilhqot'in Nation advised the Province that the NoW application for the 2016 Drilling Program should not be approved. Despite this objection, on July 17, 2017, the Province's Senior Inspector of Mines approved the NoW application for the 2016 Drilling Program, subject to 37 mitigation conditions.

In response to the Applicants' application for judicial review of the Approval, the chambers judge conducted a now familiar review and application of the case law relating to the duty to consult and accommodate. While recognizing that the situation involved "acknowledged material interferences" with "recognized rights, conceded rights, and accepted strong *prima facie* rights", the chambers judge held that the Province had not breached its duty to consult and dismissed the application. In coming to this finding, the chambers judge concluded (in the 2018 decision):

> More broadly, I find that both the consultation process and degree of accommodation were such that the honour of the Crown was maintained, and adequate reconciliation efforts were made in the circumstances. The reasons from the Senior Inspector provide a satisfactory, reasoned explanation as to why the petitioners' position was not accepted: *West Moberly 2011* at para. 148. While reconciliation may not be achieved because of an honest disagreement over whether the project should proceed, that does not mean the process was flawed: *Prophet River* at para. 67. (para 122)

The BCCA agreed with the chambers judge and dismissed the applicant's appeal. It is from that decision that an application for leave to appeal to the SCC is sought.

Application for Stay of Order

Pending a decision from the SCC regarding the application for leave to appeal, Chief William then applied to the BCCA for a stay of the order allowing TML to proceed with the exploratory drilling program.

Drawing on the test for injunctions from *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311, with modification, Butler JA considered whether:

> a) there is some merit to the appeal in the sense that there is a serious question to be determined (and whether there is some merit in the leave application);
>
> b) irreparable harm would be occasioned to the applicant if the stay was refused; and
>
> c) on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

Butler JA concluded the applicants had met the test for a stay of proceedings and that it was in the interests of justice to grant that stay (at para 51). Drawing on earlier decisions granting

injunctions involving the same issues relating to the Approval, Butler JA was easily satisfied that irreparable harm would be occasioned to the applicant if the stay was refused and on balance, the inconvenience to the applicant would be greater if the stay was refused. Notably, with respect to the balance of convenience, Butler JA found that "if the stay is not granted, there will be injury to the land that will not be restored for many years. The Tsilhqot'in peoples' cultural practices will be impaired and they will have lost the opportunity to purse their s. 35 rights, including their right to a deep level of consultation and accommodation. The loss of that right is not insignificant; it would mean losing the opportunity to determine whether government action, such as the grant of an approval, to which they do not consent, is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*" (at para 48).

Merits

It is, however, Butler JA's reasoning with respect to the merits of the appeal, and the leave to appeal application, that is particularly noteworthy. TML argued that it was "extremely unlikely the SCC will find that this case raises an issue of public importance such that it might grant leave to appeal. Relying on *Prophet River First Nation v British Columbia (Environment)*, 2017 BCCA 58 (CanLII), *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 (CanLII) and *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 (CanLII), it says the appeal will involve the application of settled law" (at para 39). Butler JA's response to this argument warrants repeating:

> [40] I do not accept TML's argument. In particular, I do not accept that *Prophet River*, *Ktunaxa* and *Beckman* are comparable cases. The nature of the s. 35 rights and the issues considered in those decisions are different from the case at bar. It is possible the SCC might grant leave because the questions raised by this leave application are not settled.
>
> [41] *Prophet River* deals with treaty rights, as opposed to proven existing s. 35 Aboriginal rights. The duty to consult and accommodate with respect to treaty rights at issue in *Prophet River* was earlier settled by the SCC in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII) and *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 (CanLII). As *Haida* (at paras. 48–50) and *Tsilhqot'in* (at para. 80) make clear, the duty to consult and accommodate is substantively different in the context of proven existing s. 35 rights.
>
> [42] *Ktunaxa* is distinguishable as a case about s. 2(a) *Charter* rights and the duty to consult and accommodate with respect to traditional lands where s. 35 Aboriginal rights and title are claimed but have not yet been proven (as was the case in *Haida*). The underlying circumstances on which the Ktunaxa's claim was based were somewhat unique. The SCC held that the Ktunaxa's claim did not fall within the scope of s. 2(a) because neither the Ktunaxa's freedom to hold their beliefs nor their freedom to manifest those beliefs was infringed by the Minister's decision to approve the project. The Court also found that the procedural duty to consult and accommodate with respect to the Ktunaxa's potential but unproven claim had been met. The duty to consult and accommodate considered in Ktunaxa is thus not readily comparable to the duty in this case.

[43] *Beckman* considered the duty to consult and accommodate with respect to treaty rights arising from a modern comprehensive treaty. Again, this is quite different from the situation here.

[44] The SCC has not yet undertaken a substantive analysis of the sufficiency of consultation and accommodation with respect to proven s. 35 rights. It has yet to consider what "consent" means in the context of consultation and accommodation with respect to such rights and has not applied the justification analysis from *Tsilhqot'in* in that context.

[45] Given these considerations, I am of the view that the SCC might grant leave to consider the issues raised by this leave application. Accordingly, I find that the applicants have met the merits test taking into account the leave requirements in s. 40(1) of the *Supreme Court Act*.

Commentary

It of course remains to be seen whether the SCC will grant leave to hear the *William* appeal in this matter. However, Butler JA is most certainly correct in drawing out what is distinctive about this case. While there are now several important cases on the duty to consult and accommodate, the courts have not properly grappled with the question of the sufficiency of consultation and accommodation at the highest level of the spectrum – when proven s 35 rights stand to be irreparably harmed. More than this, when proven rights stand to be infringed, questions beyond the proper discharge of the duty to consult remain to be answered. What is the role of consent? When, as in this case, consent is withheld, how does the justification test articulated by the SCC in its 2014 *Tsilhqot'in* decision apply to proven Aboriginal rights? Does the onus not shift to government to demonstrate that the action is consistent with its fiduciary obligation? When is interference with the rights of future generations substantial enough not be tolerated?

These are important questions. It is not without irony that Chief Roger William is asking the SCC for leave to consider them. After all, he is simply asking that the principles articulated by the SCC in *Tsilhqot'in*, a decision resulting from an application that he himself first brought in his representative capacity almost 30 years ago, be applied to proven s 35 rights. That issues of public importance are at stake is beyond doubt. Indeed, resolution of these questions goes to the very heart of s 35 and the project of reconciliation.

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