Divided Supreme Court Dishes Delphic Decisions While Dissing Consultation On Legislation: Mikisew Cree First Nation v. Canada

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In 2012 the then Government of Canada's Omnibus budget legislation included significant amendments to the environmental assessments and approval provisions of both the Canadian Environmental Assessment Act and the Fisheries Act. This was a matter of concern to the Mikisew Cree, who took the view that the Government ought to have first consulted with Indigenous peoples who, and whose aboriginal rights, might be affected by the legislative changes. They said that this was necessary because the laws involved the environmental assessment of projects that might have adverse impacts upon the rights of the Mikisew Cree, including the rights to hunt fish and trap under Treaty No. 8. The federal government took the position that the development of government policy and its implementation as law is an exercise of government's legislative power, which has been consistently held to be immune from judicial review.

All nine judges of the Supreme Court of Canada agreed with the Federal Court of Appeal that the Federal Courts Act does not grant the Federal Court the jurisdiction to review the actions of federal ministers in the parliamentary process. Were that the end of the story, this would be a very short article indeed. However, the development of the common law related to Indigenous peoples in Canada, like life in general, is not that simple. Instead, the various Justices of the Supreme Court issued four separate sets of concurring reasons, each different. The entrails having been cast by the Court, we are left to divine its intentions and their impact on how government can legislate in areas that may affect Indigenous peoples, both in accordance with the honour of the Crown and in compliance with government's consultation obligations under section 35 of the Constitution Act, 1982.

In this game of numbers, the judgment of Justice Brown was concurred in by three other Justices - Rowe J., Moldaver J., and Côté. All agreed "… that the entire law-making process -

from initial policy development to and including royal assent - is an exercise of legislative power which is immune from judicial interference." That analysis leaves no room for the courts to impose a duty of consultation with affected Indigenous peoples in the course of the law-making process. Justice Brown wrote that when a Minister of the Crown acts to present a set of policy decisions which leads to the drafting of a legislative proposal submitted to Cabinet and then the formulation and introduction of legislation in Parliament (or the Legislature), those actions are taken in a legislative capacity. By reason of the separation of the judicial, executive, and legislative powers in the Canadian Constitution, it is not open for the courts to interfere with the exercise of those legislative powers. By this reasoning, the protection of the rights of Indigenous peoples under the Canadian Constitution does not mandate consultation prior to the enactment of new legislation. Although executive actions by the officers of the Crown (such as issuing approvals) are subject to prior consultation in circumstances in which consultation is warranted, the enactment of legislation is not.

Justice Brown and the three judges that agreed with him were highly critical of the cryptic comments contained in the concurring reasons of the other Justices. He wrote that "… an apex court should not strive to sew uncertainty, but rather to resolve it by, wherever possible (as here), stating clearly the rules."

Justice Rowe added three points to Justice Brown's analysis:

- Indigenous peoples are protected by Section 35 of the Constitution Act, 1982, which allows laws to be challenged after being enacted;
- requiring prior consultation with Indigenous peoples in the process of preparing legislation, including budget bills, would disrupt the parliamentary process; and
- accepting the Mikisew Cree's position would result in courts having to take an interventionist role in supervising the development of legislation.

In her reasons, Justice Karakatsanis (concurred in by Wagner C. J. and Gascon J.) undertook an analysis of the concept of the "honour of the Crown", the foundation of the duty to consult, which goes back to the Royal Proclamation of 1763. She wrote that the purpose of the concept is the reconciliation of the Crown's assertion of sovereignty over Indigenous peoples and pre-existing sovereignty, rights and occupation of those peoples. In her analysis the duty to consult forms one of the Crown's obligations and ensures that the Crown acts honourably by preventing it from acting unilaterally in ways that undermine aboriginal and treaty rights. It promotes negotiation and settlement as an alternative to litigation. She did conclude that "… the law-making process - that is, development, passage and enactment of legislation - does not trigger the duty to consult." That applies to the development of legislation as well as its enactment. In response to the Mikisew Cree's assertion that legislation can only be challenged on the basis of actual infringement of section 35 rights, she stated, "Other doctrines may be developed to ensure the consistent protection of section 35 rights and to give full effect to the honour of the Crown through review of enacted legislation." She concluded, "While an aboriginal group will not be able to challenge

legislation on the basis that the duty to consult was not fulfilled, other protections may well be recognized in future cases."

Justice Abella (concurred in by Martin J.) wrote that the obligation of honour of the Crown does give rise to the duty to consult and accommodate in relation to all contemplated government conduct that has the potential to adversely impact assertive or established aboriginal or treaty rights, including legislative action. In her view, this arises out of the Crown's overarching responsibility to act honourably in all its dealings with Indigenous peoples, which duty cannot be undermined or extinguished by concepts of parliamentary sovereignty.

For those of you keeping the box score: all nine judges agreed that the Federal Court did not have the jurisdiction to review Parliament's legislative actions; seven judges agreed that legislative action did not give rise to a duty of prior consultation; and three judges said that, down the road, the court might find other ways to grant remedies to protect the rights of Indigenous peoples in the law-making process.

Populating a spreadsheet with checkmarks, notes and cross-references in order to be able to advise clients on the current state of the law and the future direction of its development, as expounded by, and, as is often the case, expanded by, the Supreme Court, is a less than satisfying exercise. It may well be some time and much litigation before the elements of the various decisions coalesce into guiding stars that will allow resource developers, Indigenous peoples, and governments to safely and predictably navigate into the future.
