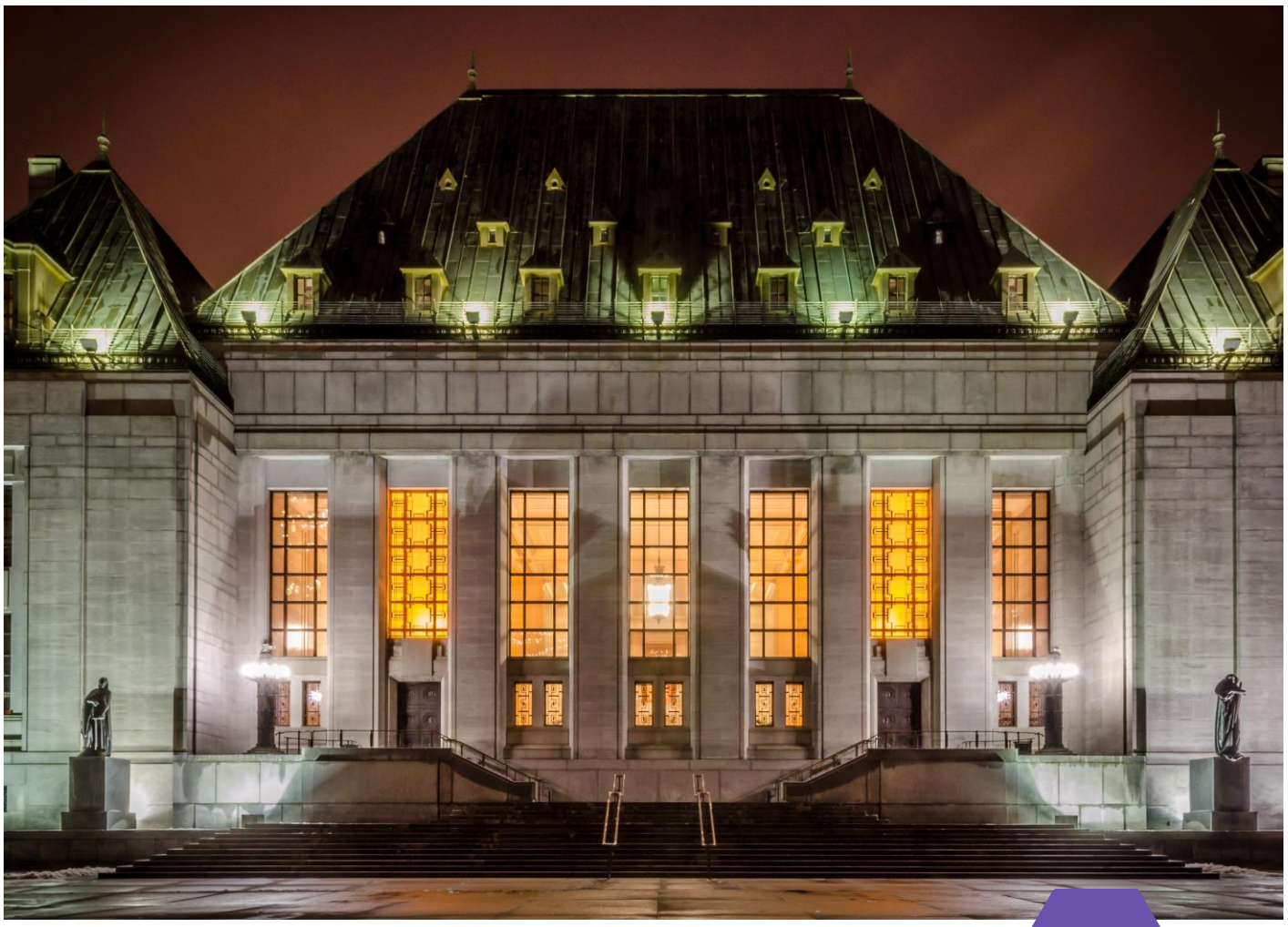
The Constitution, the Duty to Consult and Trans Mountain

By John Stefaniuk



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A number of years ago I attended an event at which Irwin Cotler, then Federal Minister of Justice, was the featured speaker. Being a former professor, his speech was as much a university lecture as anything else. The focus of his engaging and entertaining presentation was how, with the repatriation of the Constitution in 1982, and the adoption of the *Canadian Charter of Rights and Freedoms*, Canada moved from being a parliamentary democracy to a constitutional democracy. One of his sub-theses was that not all of the governments within Canada that had cottoned on to this fact.

What Cotler meant was that with the adoption of the *Constitution Act, 1982*, something that most people my age were taught in grade school was no longer the case. Parliament (and, within its respective jurisdiction, the provincial legislature) was no longer supreme. All government action, including legislation, had to be undertaken in a manner that is consistent with the Constitution. Actions and laws that are unconstitutional can be struck down by the courts on application by aggrieved parties. The judiciary, as separate from the executive and legislative branches of government, are the gatekeepers in protecting the public from illegal government interference with protected individual and collective rights.

One set of rights recognized by the *Constitution Act, 1982* are rights enjoyed by “aboriginal peoples of Canada”. That term includes the Indian, Inuit and Métis peoples of Canada. Section 35 specifically recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada as a constitutionally guaranteed right.

The courts, including the Supreme Court of Canada, have had many opportunities to interpret Section 35. Through its decisions the Supreme Court has identified a duty on the part of government (both federal and provincial) to maintain the “honour of the Crown” in its dealings with aboriginal peoples. The Supreme Court of Canada has provided guidance as to the circumstances under which government may interfere with the constitutionally protected rights of aboriginal persons. Where the Crown is considering a decision that *may* impact on aboriginal or treaty rights, the Crown *must* consult with the affected peoples in a meaningful way and accommodate the aboriginal and treaty rights or put forward measures which would mitigate the adverse impacts upon those rights. Cases have also considered the scope of consultation, the timing, the resources provided to the affected aboriginal peoples to support a meaningful consultation and the respective duties of the parties to participate meaningfully in consultation.

In that context, the Federal Court of Appeal's 254 page decision released August 30, 2018 in *Trans Mountain* is nothing earth-shattering from a legal perspective. Justice Dawson, who wrote for the unanimous Court, stated that the decision on the validity of the National Energy Board process was the result of "Applying largely uncontested principles established by the Supreme Court of Canada to the factual record, a factual record that is also largely not contested..." The Court found that the NEB erred when it decided not to include the impacts of tanker traffic in its review; therefore, its report and recommendations could not be relied upon by Federal Cabinet with that deficiency. The Court also held, after applying "… the largely uncontested legal principles that underpin the duty to consult with Indigenous Peoples and First Nations set out by the Supreme Court..." that Canada failed to engage in meaningful dialogue and failed to explore accommodation of the concerns that had been expressed by the affected Indigenous groups in the final approval stages.

The Court outlined many of the applicable legal principles:

- The duty to consult is founded in the honour of the Crown and section 35
- The duty arises whenever government knows or ought to know that its contemplated actions might adversely impact Indigenous rights or title
- The extent of consultation depends on the strength of the Indigenous claim and the seriousness of potential impacts
- Government may delegate its consultation obligations to a tribunal, such as the NEB
- Despite any delegation, government remains responsible for ensuring that adequate consultation, and, where appropriate, accommodation, have taken place
- The right to consultation and accommodation is not a veto; it is a balancing of interests
- The honour of the Crown requires government to take steps to avoid irreparable harm to Indigenous interests and to minimize impacts
- All parties must consult in good faith
- Meaningful consultation requires dialogue and serious consideration of accommodation

While these are not new concepts, the impacts of the decision on the project itself are enormous, as are the political ramifications. The Court sent the decision back to Cabinet for "prompt redetermination". What that will entail has not been publically announced. What is clear is that the Federal Government will be hard pressed to avoid further, meaningful consultation with the affected Indigenous groups on those issues in respect of which the prior consultations were adjudged to be deficient. With the constitutional protection afforded to the right to be consulted, there is no legislative override that could abrogate that right. And that is exactly how the Constitution is supposed to work.

John Stefaniuk is lawyer who practices in the areas of natural resource and environmental law.

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ABOUT THE AUTHOR

John Stefaniuk

Phone: 204.934.2597 | Email: jds@tdslaw.com | Web: www.tdslaw.com/jds

John Stefaniuk engages in a broad practice with emphasis on environmental law, real estate and development law, natural resources and energy, commercial law and municipal law.