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Case Brief **July 2017**

The Duty to Consult & the Legislative Process

Canada (Governor General in Council) v. Mikisew Cree First Nation, 2016 FCA 311

The Crown's duty to consult and accommodate First Nations will once again receive scrutiny from Canada's highest court, this time with respect to legislative action. At issue is whether the Crown has a duty to consult First Nations before it introduces legislation that may adversely impact treaty rights.

In December 2016, the Federal Court of Appeal ruled against Mikisew Cree First Nation (MCFN), determining that the Crown does not have an obligation to consult when contemplating changes to legislation that may adversely impact treaty rights. The Court rested its findings on case law surrounding the doctrine of the separation of powers.

After explicitly declining to address this issue in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*[1], the Supreme Court granted MCFN leave to appeal in May 2017. The forthcoming case will likely mark an important step in defining the relationship between the separation of powers and the Crown's constitutional duty to consult.

Background

In 2012, the federal government introduced Bills C-38 and C-45, two omnibus bills that repealed and replaced the former *Canadian Environmental Assessment Act* (CEAA) and introduced substantial changes to the *Navigation Protection Act*, *Fisheries Act*, *Canadian Environmental Protection Act, 1999* and *Species at Risk Act*.

At trial, MCFN claimed that the diminished oversight introduced by the two omnibus bills could adversely impact the First Nation's rights.[2] MCFN sought declarations that the federal government had a duty to consult with the First Nation when it developed and tabled the omnibus bills, and that the government had breached its duty.

The Federal Court dismissed most of MCFN's arguments, but held that Canada has a duty to consult with MCFN with respect to a few specific provisions in legislation that presented sufficient potential risk to the First Nation, and that this duty was triggered at the time each omnibus bill was introduced. The Court granted a declaration to this effect.
The Crown appealed and MCFN cross-appealed the decision.

[1] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal* Council, 2010 SCC 43 (CanLII) at para 44.
[2] *Courtoreille v. Canada* (Aboriginal Affairs and Northern Development), 2014 FC 1244 (CanLII).

Federal Court of Appeal Decision
On appeal, the Court considered two issues:

1. Whether the Federal Court Judge improperly conducted a judicial review of legislative action, contrary to the *Federal Courts Act*.
2. Whether the Federal Court Judge failed to respect the doctrine of separation of powers or the principle of parliamentary privilege.

Judicial Review of Legislative Action
To attract a judicial review under sections 18 and 18.1 of the *Federal Courts Act* (FCA), the impugned decision must be made by a "federal board, commission or other tribunal."[3] Both the lower and appeal courts found that this category excludes, among others, the Senate, the House of Commons, or any committee or member of either House. The question, therefore, was whether the Ministers' actions in this case were excluded under the FCA.

The Crown claimed that the Federal Court did not have jurisdiction to review the case because the subject of review was legislative action, not government action. MCFN argued that the FCA gave the Court jurisdiction to decide their case, as the Ministers were not acting as members of Parliament but as Cabinet Ministers exercising their executive powers.[4] MCFN reasoned that a distinction can be made between Ministers acting as policy-makers and Ministers acting as legislators in the legislative process. [5] MCFN claimed that it sought judicial review of ministerial decisions in the policy-making stage and as such, the FCA applied.

The Court found that MCFN's interpretation amounted to an "artificial" deconstruction of the Minister's functions. The Court maintained that the law as set out in *Criminal Lawyers' Association* provides that "making policy choices and adopting laws are explicitly recognized as functions of the legislative branch."[6] It follows that at all stages of the law-making process, Ministers act as legislators and not statutory decision-makers."[7]

The Court concluded that the Crown's actions in this case were legislative in nature and, accordingly, fell outside of the Court's jurisdiction under the FCA.[8]
Although the Court found that it lacked jurisdiction to decide the issue, it went on to review the merits of the case.

[3] *Canada (Governor General in Council) v Mikisew Cree First Nation*, 2016 FCA 311 at para 23 [*Mikisew*].
[4] *Ibid* at para 28.
[5] *Ibid* at para 29.
[6] *Ibid* at paras 30-31. The Court cited *Criminal Lawyers' Association* at para 28.
[7] *Ibid* at para 32.
[8] *Ibid* at para 38.

Separation of Powers and Parliamentary Privilege

The Court determined that the doctrine of the separation of powers also prevented the Court from providing relief in this case. The separation of powers, which limits the courts' oversight over the executive and legislative branches, is not a constitutionally entrenched principle. However, the Federal Court reiterated that separation of powers and parliamentary sovereignty are "well-established pillars of our Constitution" that the Supreme Court has repeatedly recognized.[9]

The Court found that imposing a duty to consult in the legislative process would violate the separation of powers. The Court stated: "If there is one principle that is beyond any doubt, it is that courts will not supervise the legislative process and will provide no relief until a bill has been enacted."[10] The Court relied on Sopinka J.'s findings in *re Canada Assistance Plan,* where Sopinka held that '[a] restraint on the executive in the introduction of legislation would place a fetter on the sovereignty of Parliament itself.'"[11] The Court found that the separation of powers allows for the Court's oversight only after legislation has been enacted.[12]

The Court concluded:

> I am therefore of the view, for all the foregoing reasons, that the legislative process, from its very inception where policy options are discussed and developed to the actual enactment of a bill following its adoption by both Houses and the granting of royal assent by the Governor General, is a matter solely within the purview of Parliament. Imposing a duty to consult at any stage of the process, as a legal requirement, would not only be impractical and cumbersome and potentially grind the legislative process to a halt, but it would fetter ministers and other members of Parliament in their law-making capacity.[13]

At the same time, the Court observed that "it is good politics to engage stakeholders such as Aboriginal groups on legislative initiatives which may affect them or regarding which they have a keen interest, before introducing legislation into Parliament."[14] The Court also noted that although there is no free-standing right to be consulted on legislation that might affect one's Charter rights,

[9] *Ibid* at para 52.
[10] *Ibid* at para 59.
[11] *Ibid* at para 54.
[12] *Ibid* at para 53, citing *Reference re Resolution to Amend the Constitution,* [1981] 1 SCR 753 and re *Canada Assistance Plan,* the Court relied upon the "well-established principle" barring a reference, courts will only intervene after legislation is enacted and not before, except when their opinion is sought by a government on a reference.
[13] *Ibid* at para 60.
[14] *Ibid* at para 61.

this legislation might be more difficult for the government to justify under section 1 of the *Canadian Charter of Rights and Freedoms* without consultation.[15]

Why this case matters

The question of whether the duty to consult extends to the development of legislation has significant implications for the scope of the Crown's obligations to First Nations in the Parliamentary process. The Supreme Court will now likely have to define the relationship between the longstanding doctrine of separation of powers and the constitutional duty to consult. [16] Such an analysis will require the Court to consider the separation of powers in light of our modern understanding of the Constitution and the purpose of section 35. This purpose includes the reconciliation of Aboriginal peoples with the Crown's assertion of sovereignty.[17] The separation of powers doctrine has not historically contemplated a role for Aboriginal peoples, and the Court's review of this gap is long overdue.

[15] *Ibid* at para 55; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[16] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal* Council, 2010 SCC 43 (CanLII) at para 44.
[17] *Mitchell v M.N.R.*, [2001] 1 SCR 911; *Haida Nation v British Columbia (Minister of Forests),* [2004] 3 SCR 511.