

Recent Developments in Environmental and Aboriginal Law

Some Issues Facing the Mining Industry

CIM - MES

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Lawyer's Disclaimer

I have worked mining companies, Aboriginal organizations, Governments and other Industries

This presentation does not reflect position of BLG clients

The review of cases is not at all exhaustive

I may change my mind

The Cases – Tsilhqot'in and Grassy Narrows

***Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44,
June 26, 2014**

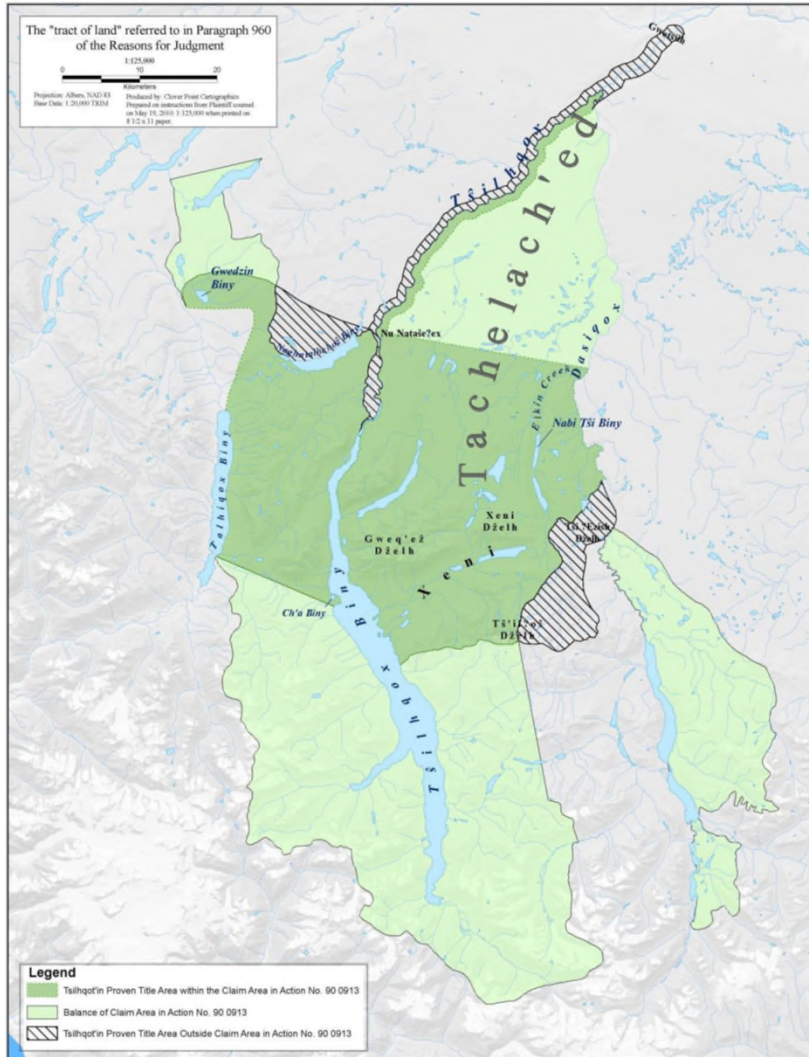
<http://scc-csc.lexum.com/scc-csc/scc-csc/en/14246/1/document.do>

- **B.C.**

***Grassy Narrows First Nation v. Ontario (Natural Resources)* 2014 SCC 49, July 11, 2014**

<http://scc-csc.lexum.com/scc-csc/scc-csc/en/14274/1/document.do>

Tsilhqot'in



Tsilhqot'in

Overview

- **Relates to Aboriginal Title**
- **No Treaty in place**
- **Logging rights granted by B.C. in the traditional lands of 6 First Nations**
- **Litigation followed – First Nations objected and sought declaration stopping the logging activity**
- **SCC overturned lower court decisions and granted a declaration of Aboriginal title over the area**

Tsilhqot'in

Findings

- **First Time Aboriginal Title awarded by the Courts**
- **Non- treaty v. treaty lands (B.C. has few treaties – rest of Canada has many more treaties in place)**
- **Consent required from title holding Aboriginal group for development on the land**
- **Crown may justify “incursions” on title but cannot deprive rights holder of “right to the benefits associated with the land”**
- **“Honour of the Crown” repeated as the key guiding principle (was not met here by B.C.)**

Tsilhqot'in

Significance?

- **Application elsewhere? (potentially in limited circumstances, especially outside B.C.)**
- **Indications of trends?**
 - For Aboriginal matters generally? (likely)
 - For the Supreme Court based on it's composition? (perhaps surprisingly, likely not)
- **Significant or Business as Usual?**
 - Depends on one's perspective

Grassy Narrows



Grassy Narrows

Overview

- **Treaty 3 lands in Northwestern Ontario**
- **Case relates to “taking up” of treaty lands for “settlement, mining, lumbering or other purposes”**
- **Ontario had issued permit to allow clear cutting**
- **Grassy Narrows objected and sought to stop the activity saying it infringed its hunting and fishing rights under Treaty 3**
- **Lower Court divided on whether Ontario could issue permit without involvement of Canada**

Grassy Narrows

Findings

- **SCC held that Ontario can “take up” Treaty 3 lands as it had – No requirement to involve Canada**
- **Court repeats the importance of “taking up” being done ‘in conformity with the honour of the Crown, and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests’.**
- **Anishinaabe nations must have a meaningful right to hunt.**

Continuing evolution of the Law

Common points

- Decisions both unanimous
- Supreme Court continuing in similar direction – not introducing new trends or principles
- Current government appointees on the Supreme Court are not Dissenting



Consultation and Regulatory Agencies

How much consultation is adequate to satisfy the Crown's Duty to Consult

- Environmental Assessment process?
- Is more consultation needed?



Earlier Case

Qikiqtani Inuit Association v. Canada - case regarding the RV Polarstern in August, 2010

Injunction granted by the Nunavut Court – despite the having obtained the “requisite” approvals and conducting the “required” consultation



Clyde River Case - Status

Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS)

Held: National Energy Board (“NEB”) consulted as required

Seismic testing currently on hold

Supreme Court of Canada

Hearing: November 2016

Decision: Pending (anytime now, really)

Who is involved?

The Parties:

Hamlet of Clyde River, Nammautaq Hunters & Trappers Organization – Clyde River, and J. Natanine

v.

TGS-NOPEC Geophysical Company ASA (TGS), Petroleum Geo-Services Inc. (PGS), Multi Klient Invest as (MKI) (together the “Proponents”), and Canada (A-G)

What is the Case About?

Facts:

The dispute was about the issuance of a Geophysical Operations Authorization (“Authorization”) by the NEB to conduct offshore seismic testing in Baffin Bay and the Davis Strait

The NEB granted the Authorization

A judicial review of the decision was taken to the Federal Court of Appeal – saying Crown had not complied with the Duty to Consult and Accommodate the Inuit

The FCA agreed that the Crown could rely on the NEB process to comply with the Duty

What is the Case About?

The Issues:

Has the Crown (“in right of Canada”) satisfied its Duty to Consult and Accommodate Canada’s Aboriginal people?

Can the Crown rely on the National Energy Board’s authorization process to satisfy the Duty to Consult and Accommodate the Inuit of Clyde River?

Was the NEB authorization process adequate?

What Did the Federal Court of Appeal Say?

The Court equated the implementation of the NEB regulatory process as a “mandate [on the NEB] to engage in a consultation process such that the Crown may rely on that process to meet, at least in part, its duty to consult with Aboriginal peoples” (para 65)



What should we expect?

We do not know....

The case was heard by the SCC along with another case involving a decision of the NEB (*Chippewas of the Thames First Nation v. Enbridge*)

The SCC granted leave to appeal both cases together and the arguments were heard together.

The SCC seems to want to say something about the Crown's Duty to Consult as it pertains to the NEB

Implications for other Tribunals are likely

Compare: the Clyde River FCA decision to the Chippewas decision

Clyde River:

“For these reasons, I am satisfied that to date the Board’s process afforded meaningful consultation sufficient that the Crown may rely upon it to fulfil its duty to consult.” (para 100)

Chippewas:

“...none of this is to say that the Board had the duty or power to actually perform the consultation. It is a point of agreement between [the majority, minority and the parties] that the Board is incapable of actually fulfilling the duty to consult. To the extent that the Minister purported to rely on the Board to fulfill the duty to consult, he did so in error.”
(para 120)

Environmental Assessment (“EA”) Federal Changes Coming?

Expert Panel: Review of Environmental Assessment Process

- started summer 2016
- report made public April 5th

Many well meaning, good suggestions that reflect best practices for EA in other jurisdictions (the North for example)

However, concerns expressed by many (including mining industry)

- proposals characterized as “complex and unworkable...incoherent governancefailure to consider roles of provinces” (MAC comments)

EA - Federal Changes Coming? Cont.

Expert Panel: Review of Environmental Assessment Process

- Link to Report:
<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>

Comments were accepted to May 5th

Government plans to publish a discussion paper in early June

Sounds like regulatory changes are likely.... Not clear what they will look like

CHANGES **ONE** BOWIE



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**Qujannamiik
(thank you)**

