GOWLING WLG

# DIVISIONAL COURT FINDS DUTY TO CONSULT REQUIRED CROWN TO PROVIDE PROMISED CAPACITY FUNDING

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In Saugeen First Nation v Ontario (MNRF) ("Saugeen"),[1] the Ontario Divisional Court took the unprecedented step of recognizing that the Crown's duty to consult included an obligation to provide a First Nation with capacity funding to facilitate the consultation process.

Although the Court's specific holding in Saugeen is limited to the particular facts at issue (including the Crown's unfulfilled agreement to provide the funding in question), the Court's obiter dicta explanation of the reasonableness of the Saugeen Ojibway Nation's funding request provides a blueprint for future First Nation claimants to follow.

## Background

In February of 2008, T &P Hayes Ltd ("Hayes") applied for a license under the Aggregates Resources Act[2] to operate a limestone quarry on its land in the Bruce/Saugeen Peninsula ("the Project"). The Saugeen Ojibway First Nation ("SON") had previously claimed, inter alia,Aboriginal title and hunting rights to its traditional lands on the Bruce/Saugeen Peninsula, which included Crown lands abutting the Project.[3]

In 2011, SON contacted the Ministry of Natural Resources and Forestry ("MNRF") to assert its right to be consulted with respect to the Project, and to requesting funding for the experts, legal team, and staff that it would require to meaningfully participate in the consultation process.

What followed was nearly five years of correspondence in which MNRF repeatedly altered its position with respect to the existence and scope of its consultative obligations. Inter alia, in October of 2012, and following SON's submission of a $16,124 budget for consultation-associated costs, MNRF offered SON funding in the amount of $8,514, which it later increased to $10,914 but never paid. By February of 2016, MNRF was taking the

position that it had discharged its obligations by after delegating them to proponent, Hayes. The Minister approved the license for the Project on March 8, 2016.[4]

SON sought judicial review of the Minister's decision to issue the license. At issue was whether the MNRF had adequately discharged its duty to consult before it approved the Project.

# The Divisional Court's Decision

After identifying reasonableness as the appropriate standard of review on the question of whether the Crown has discharged its duty to consult, the Court found, inter alia, that it was unreasonable for the Crown not to provide the promised funding:

It would be open to the Crown, in an appropriate case, to reject a request for funding and to decide that a First Nation did not require expert assistance to participate adequately in consultations. Such a decision would be reviewed in this court on a standard of reasonableness. In this case, however, the Crown did agree to fund the cost of experts for SON. Having agreed to fund those costs, it was unreasonable for MNRF to then fail to do that. No new information emerged that would have borne upon the Crown's agreement to fund these costs. Thus, in finding that the Crown is obliged to provide this funding in this case, I do no more than find that the Crown is obliged to keep its word where there is no basis on which the Crown should be relieved of its agreement.[5]

Justice Corbett, writing for a unanimous panel, found the duty to consult had not been discharged, overturned the Minister's decision, and remitted the matter back to the Ministry for re-determination of the licensing application pending the completion of adequate consultations with the Nation.[6]

# The Divisional Court's Obiter Dicta

Following the above conclusions, Justice Corbett made the following obiter remarks:

MNRF has agreed to fund preliminary consultation costs and SON has agreed to proceed on the basis of that funding, so it is not necessary to decide whether funding is required in the absence of agreement… There are two related points worth noting, however.

First, SON sought initial funding to help understand the issues raised by the Project, and to address those issues effectively with MNRF. SON did not ask to have all the technical work done over again by its own experts. SON's budget included modest legal costs.

MNRF did not explain why it rejected and continues to reject funding for SON's reasonable legal costs to consult.

As noted above, SON is disinclined to spend its "community resources" to review someone else's project. That is a reasonable position.

SON has limited resources. It does not participate in consultations as a party to the Project. The expense of consultation arises as a result of a proponent's desire to pursue a project, usually for gain, and the Crown's desire to see the project move ahead. The Crown should not reasonably expect SON to absorb consultation costs from SON's general resources in these circumstances.

Second, clearly the process went "sideways" in this case. SON was put to considerable legal expense to make its case to MNRF that there is a duty to consult and that the scope of that duty includes funded experts. It will be for the parties to decide whether and to what extent the Crown should reimburse these legal expenses on a reasonable basis, taking into account (a) the legal costs to be paid to SON as a result of this decision; (b) the legal and other costs reasonably incurred by SON in its dealings with MNRF and Hayes over the Project to this point. [7]

These remarks, although not binding, may ultimately prove significant in two ways.

First, Justice Corbett's comments about what made SON's request for capacity funding reasonable may be generalizable for future First Nations claimants. That is, a future First Nation claimant could plausibly invoke Saugeen as a basis for a capacity funding request where:

- it can be shown that meaningful consultation requires expertise the community lacks;
- the First Nation has limited community resources; and
- the costs associated with consultation are triggered by the decisions or desires of other parties.

Second, Justice Corbett also seems to suggest that the Crown's obstinacy with respect to the duty to consult could ground an obligation to reimburse "reasonable" legal expenses incurred while asserting a Nation's right to be consulted.

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[1] Saugeen First Nation v Ontario (MNRF), 2017 ONSC 3456 (Div Ct) ["Saugeen"].

[2] Ministry of Natural Resources Act, RSO 1990, c. M.31, ss. 2 and 4; Aggregates Resources Act, RSO 1990, c. A.8, ss. 1 and 3(1).

[3] Saugeen at paras 39, 43.

[4] Saugeen at paras 112-114.

[5] Saugeen at para 127.

[6] Saugeen, supra at para 161.

[7] Saugeen, supra at paras 156-160.



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