

BREAKING CASE LAW

*Yellowknives Dene
First Nation v.
Canada*



This Issue

Cumulative Impacts & The Duty to Consult

Yellowknives Dene First Nation v. Canada
2015 FCA 148

Recently, the Federal Court of Appeal released an important decision in the context of cumulative impacts assessment and specifically impacts to heritage resources. This decision is also significant in demonstrating the reviewing court's willingness to place the Crown's duty to consult on the shoulders of administrative tribunals mandated to conduct environmental assessments.

While the decision may not be the final chapter on the issue of whether the Crown's duty to consult can be fully transferred to the environmental assessment process, it is currently an authority that conclusively linked the constitutional doctrine of consultation to the process requirements founded in administrative law.

Background

On June 19, 2015, the Federal Court of Appeal (FCA) issued the decision to uphold the dismissal of the Yellowknives Dene First Nation's application to quash a decision from the Mackenzie Valley Environmental Impact Review Board (Review Board).

The Review Board's decision recommended that a small-scale drilling project in the DryBones Bay area (Proposed Project) should proceed. Its decision was based on the conclusion that the project was not likely to have any significant adverse environmental or socio-economic impact or cause significant public concern. The Review Board's decision was forwarded to the responsible minister.

The Yellowknives Dene challenged the Review Board's decision as unreasonable and inconsistent with its earlier decisions about cumulative effects in the Drybones Bay area. Previously, the Review Board found that the increasing number of developments and activities were causing significant adverse impacts to the heritage and archaeological resources in the area. It concluded that unless certain actions were taken to implement land use planning measures to address future developments, the adverse effects would likely cause unacceptable cumulative impacts on the Aboriginal groups.

Suite 2250
10104 – 103 Avenue
Edmonton, Alberta
T5J 0H8

Tel 780.448.9275
Fax 780.423.0163
shoresjardine.com

BREAKING CASE LAW

*Yellowknives Dene
First Nation v.
Canada*

The Drybones Bay is located on the north shore of the Great Slave Lake, Northwest Territories and has been long recognized as an area “without parallel in terms of its importance” to many Aboriginal groups, including the Yellowknives Dene. It is not surprising that the importance of this area was central to the Review Board’s earlier decisions recommending development of a land use plan to address future developments in the area. At the time of reviewing the Proposed Project, however, the government had neither accepted nor implemented the Review Board’s previous recommendations, but the Review Board nevertheless approved the drilling program.

The Court of Appeal’s Decision

The Yellowknives Dene argued that having accepted that impacts from various human activities have reached a critical threshold or a crisis in the Drybones Bay area, the Review Board ought to have recognized that even a small project would add to the cumulative impacts. The Court did not accept the argument and found that the Review Board had distinguished its earlier decisions. It further noted that the Review Board had explicitly acknowledged in its written decision that the recommended measures for land use plan of its earlier decisions were not in place.

Ultimately, the FCA concluded that the Yellowknives Dene failed to challenge the Review Board’s findings of fact and that the Review Board’s written reasons provided “an intelligible, transparent and justifiable basis for the Review Board’s conclusion about adverse impacts on the environment. That decision was within the range of possible, acceptable outcomes defensible in respect of the fact and law. It was, therefore, reasonable.”¹

The Yellowknives Dene also argued that the Review Board’s process was incapable of requiring the government to develop and implement a land-use plan. Therefore the duty to consult was not met and no accommodation was afforded to them.

The FCA found that the Review Board’s process as established under the *MacKenzie Valley Resource Management Act*, S.C. 1998, c. 25 reflects Parliament’s intent that the Review Board engage in the consultation process prior to completing an environmental assessment. The Review Board’s process provided the Yellowknives Dene and other Aboriginal groups the opportunity to adduce evidence and make submissions to the Review Board. More importantly, the Review Board provided comprehensive written reasons that demonstrated Yellowknives Dene’s concerns were considered and factored into its decision. The FCA held that the Yellowknives Dene were afforded a level of consultation that was “proportionate to the nature and extent that the Proposed Development was likely to infringe [its] Aboriginal or treaty rights claim”² – and therefore the duty to consult was discharged.

¹ *Yellowknives Dene First Nation v. Canada*, at para. 32.

² *Ibid*, at para. 66.

Suite 2250
10104 – 103 Avenue
Edmonton, Alberta
T5J 0H8

Tel 780.448.9275
Fax 780.423.0163
shoresjardine.com

BREAKING CASE LAW

*Yellowknives Dene
First Nation v.
Canada*

The FCA also rejected the Yellowknives Dene's claims for accommodation on the basis that the duty to consult need not lead to a single outcome. It was found that the Review Board's conclusion that the proposed development was unlikely to negatively impact the environment was "fatal" to the submission that meaningful consultation required land use planning as an outcome.

Cultural Cumulative Impacts Assessment

While not directly at issue, this decision provides a helpful endorsement of the Review Board's framework in conducting assessment of cumulative effects in relation to socio-economic impacts. This framework may be summarized as follows: a) identification of concerns about social and cultural issues (which may be organized into two categories: heritage and archaeological resources; and traditional practices, land use and culture); b) assessment of impact to heritage and archaeological resources by the proposed project under consideration; and c) assessment of the likelihood of impacts from the proposed development considered in relation to the previously identified cumulative adverse effects on land use and culture in the area.

The Review Board's decisions in the Drybones Bay area also raise the fundamental question of the adequacy of the environmental assessment process as a tool to address cumulative effects. This issue requires recognition of the limits inherent in project-specific assessment, which is most suited to reviewing and mitigating the potential for project-specific impacts in a fairly defined project development area. In other words, environmental assessment authorities cannot prescribe the types of development that are appropriate and compatible in a broader area outside the project development area. However, a project-specific assessment may be the most effective means to devise certain mitigation measures that could avoid or reduce effects that may escalate the cumulative effects in the region.

In respect to the integrated resource management regime, the case highlights the essential, but separate, contributions of land use planning, project assessment and monitoring – all functions necessary for the effective identification, management and response to cumulative effects. Therefore, a failure to deliver in any of these regimes could seriously hamper the capacity of the regulatory process to adequately address cumulative effects.

Duty to Consult

This decision established that the Courts, at least at the Federal Court of Appeal level, are willing to accept the proposition that administrative tribunals mandated to carry out environmental assessment may be delegated the procedural aspects of the Crown's duty to consult.

Suite 2250
10104 – 103 Avenue
Edmonton, Alberta
T5J 0H8

Tel 780.448.9275
Fax 780.423.0163
shoresjardine.com

BREAKING CASE LAW

*Yellowknives Dene
First Nation v.
Canada*

An implication for administrative tribunals is that in order to determine the scope and extent of the consultation obligation that Parliament has expressly conferred on them, they must continue to look to their enabling legislation. However, to determine whether consultation was sufficiently discharged by the Review Board's process, it is critical to note that the FCA's decision relied heavily on the Review Board's written decision as presented by its environmental assessment report. This reinforces the importance of written reasons that are intelligible, transparent and justifiable. That being the case, this decision also suggests that there are additional requirements placed on environmental assessment authorities to ensure that their reports describe how and what process was engaged for consultation process.

In the context of the current state of the law, it may be clear that an administrative tribunal is responsible for fulfilling the procedural aspects of consultation. What remains unclear, however, is the linkage between the administrative process and the substantive aspects of the Crown's duty to consult.

In other words, what is Parliament's intention in regard to the knowledge and understanding acquired through the consultation process? For example, should certain information acquired through consultation be specifically highlighted or weighted differently in the environmental assessment reports? Should recommendations of the tribunals conducting the consultation be viewed through a different lens than the information generally received in the regulatory process? More importantly, how may these information or recommendations factor differently into the decisions of the responsible minister? The issues underlying these questions raise interesting opportunities for future discussions and will undoubtedly factor prominently in future cases.

Suite 2250
10104 – 103 Avenue
Edmonton, Alberta
T5J 0H8

Tel 780.448.9275
Fax 780.423.0163
shoresjardine.com