

Update on the Duty to Consult in Ontario

Mining Act Modernization Part Two: Updating Processes for Compliance and Early Experiences

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Solid Gold v. Wahgoshig First Nation

- Facts
 - Junior exploration company
 - Conducted exploratory drilling on mining claims located within the traditional territory of Wahgoshig First Nation
 - No consultation by the company prior to commencement of drilling
- Legal proceedings
 - Injunction granted in favour of Wahgoshig
 - Leave to appeal to the Divisional Court recently granted
 - Two dramatically different decisions

Duty to Consult Issues

- Is there an action or a decision by the Crown?
- Is there an aboriginal or treaty right?
- Does the action or decision by the Crown potentially have an adverse effect on that aboriginal or treaty right?
- If there is a duty to consult, what is the required scope of consultation

Injunction Test

- Interlocutory injunctive relief may be granted where the moving party establishes that:
 1. There is a serious issue to be tried with respect to an infringement of the moving party's rights;
 2. The moving party will suffer irreparable harm if an injunction is not granted; and
 3. The balance of convenience favours granting the relief sought; that is, the irreparable harm to be suffered by the moving party is not outweighed by any irreparable harm to the respondent if the injunction is granted

Superior Court Decision

- Wahgoshig's traditional territory could contain cultural and heritage sites
 - Reciprocal duty?
- Wahgoshig had a right to be consulted and accommodated prior to Solid Gold commencing exploration activities
- Solid Gold owed a duty to Wahgoshig to consult and accommodate
- Solid Gold breached its duty
- Irreparable harm
 - Lost the opportunity to be consulted
- Injunction could issue against Solid Gold

Implications

- To industry
 - Duty to consult and accommodate
- To First Nations
 - Implicit “veto”
- To government
 - Delegation of the honour of the Crown

Leave to Appeal Decision

- Not the appeal
- No duty imposed on a junior exploration company to consult with a First Nation prior to commencing exploration activities in Ontario because:
 - (a) under the “free entry” system in Ontario there is no Crown conduct or decision that would trigger a duty to consult; and
 - (b) in any event, there is no legislative authority by which the Crown can delegate the duty to a proponent

Implications

- If the Divisional Court agrees with the leave motion judge:
 - No duty to consult let alone accommodate by an exploration company
 - No “veto” power for First Nations
 - Absent legislation no ability for the Crown to “download”
 - No duty on Crown (free entry system)

Update on Solid Gold

- Court Ordered Consultation has ended. What now?
- Director of Exploration is considering requiring a mandatory permit before April 1, 2013. Why?
- Is Divisional Court Appeal Moot? Stand by!

