the Spirit and Intent
Aboriginal and Treaty rights news www.jerchlaw.com

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The Crown Duty to Consult
Industry versus Constitutional Consultation Rights

Can private industry proceed with court injunctions in order to accomplish their private objectives regardless of Crown consultation with First Nations having been completed?

Frustrated by 16 years of negotiations of their land claims and no consultation being done by the Ontario provincial Crown, the chief and council of the Ardoch Algonquin First Nation blockaded the road leading into their traditional territory to prevent Frontenac from having access, in defense of their Aboriginal right to be consulted. The Ardoch determined not to participate in the injunction proceedings brought by Frontenac, part of its $77 million lawsuit against the Ardoch, and on August 27, 2007 an injunction was ordered against the Ardoch chief and council.

According to the Court of Appeal:
"Frontenac is not legally entitled to conduct mineral exploration within the subject property until the Crown discharges its constitutional duty to consult with the affected First Nations about the impact of mining activity on the environment, wildlife harvesting and sacred, archaeological, historical and culturally significant sites on the property."

These reasons are echoed in the earlier decision of the Ontario Superior Court in the companion case of Platinex v. Kitchenuhmaykoosib Inninuwug ("KI") First Nation, in which the same issues were being considered.

In finding that the jail sentences for the Ardoch members were inappropriate, the Court held that the private remedy of an injunction should not have been ordered until the rights of the First Nation to be consulted had been considered.

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The Court observed:

"Having regard to the clear line of Supreme Court jurisprudence, from *Sparrow* to *Mikisew*, where constitutionally protected aboriginal rights are asserted, injunctions sought by private parties to protect their interests should only be granted where every effort has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interests."

The Court held that prior to ordering an injunction against a First Nation, the Courts should determine whether the Crown consultation duties have been fully exhausted when Aboriginal and Treaty rights are at stake, that good faith has been undertaken on both sides, and that all attempts to achieve a negotiated or legislated solution have been tried.

Those efforts must be exhausted to resolve the public consultation right of First Nations prior to any Court ordering a resolution of privately held rights of mining (and other) companies.

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Leave to Appeal to the Supreme Court of Canada in Little Salmon/Carmacks

In our February 2009 newsletter we included references to the Yukon case of Little Salmon/Carmacks. We wish to inform our readers that this very important case on the duty to consult and the impact on modern treaty agreements has been granted leave to appeal to the Supreme Court of Canada. We will update further once the case progresses further towards the court and once potential intervenors become identified.

The changing stature of Oral History as evidence

In November of 2007, the T'silhqot'in First Nation's Aboriginal title case before the BC Supreme Court came to a close, largely in favour of the First Nation. Their Aboriginal title to about half of their claimed lands was recognized, and it was acknowledged that their Aboriginal rights on this land had been infringed without justification.

In Justice Vickers' decision he gave careful consideration, not only to the oral history evidence, but also to the issue of oral history as evidence. As a result, the decision in the T'silhqot'in case is one of the most clear and thorough treatments of oral history as evidence that any court in Canada has yet provided.

There are not yet established protocols in place for how to hear oral history testimony, or for how to weigh it alongside other types of evidence with which the Court is more familiar.

In Lamer's *Delgamuukw* judgement he wrote, "the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."

On the surface, this might appear to give oral history the exact same evidentiary weight as written historical records, but this has not been the way that Lamer's words have been interpreted in subsequent decisions. There has been a shift toward including oral histories as evidence, but the weight attributed to this evidence has varied.

The *T'silhqot'in* decision is the best indication so far of the direction the Canadian judiciary appears to be taking in their treatment of oral history evidence. In it Justice Vickers states,

"Courts that have favoured written modes of transmission over oral accounts have been criticized for taking an ethnocentric view of the evidence. Certainly the early decisions in this area did little to foster Aboriginal litigants' trust in the court's ability to view the evidence from an Aboriginal perspective. In order to truly hear the oral history and oral tradition evidence presented in these cases, courts must undergo their own process of decolonization."

It is too soon to say that Courts have accepted that oral history is equal to written history, but Justice Vickers describes the importance of oral traditions to T'silhqot'in people in this way,

"Oral traditions and their communication are a vital part of T'silhqot'in society. As Chief William testified: "That's the only way that we were T'silhqot'in."

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