

Bill 173 – Some Observations from the West on Aboriginal Community Consultation Provisions



June 8, 2009
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Overview

- Consultation Regulations
- Dispute Resolution
- Community Based Land Use Plans

Consultation Regulations

The Act provides

- 78.1 (1) No person shall carry out an activity prescribed for the purposes of this section on a mining claim, mining lease or licences of occupation for mining purposes unless the person has submitted an exploration plan, in accordance with any prescribed requirement, including any Aboriginal community consultation that may be prescribed
- Similar requirements are proposed for exploration permits (s. 78.2) and advanced exploration (s. 140)

Consultation Regulations

Haida (SCC 2004)

- 51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.
- 53 The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development

Consultation Regulations

- The Proposed legislation contemplates regulations which hopefully will set out:
 - how Ontario intends to discharge its constitutional obligation to consult with aboriginal communities (which cannot be delegated to proponents); and
 - the procedural aspects of the consultation to be carried out by mining proponents

Dispute Resolution

- The Act provides:
 - 105 ... every claim, question and dispute ... shall be determined by the Commissioner ... except for matters relating to consultation with aboriginal communities, Aboriginal or treaty rights or to the assertion of Aboriginal or treaty rights.
 - 170.1 (1) The Minister may designate one or more individuals or a body of individuals to hear and consider disputes under this Act relating to consultation with Aboriginal communities, Aboriginal or treaty rights or the assertion of Aboriginal or treaty rights, ...
 - 170.1(2) The individuals or body designated under subsection (1) shall hear and consider the dispute ...and shall make a report to the Ministry setting out the recommendations.

Dispute Resolution

- A government appointed body may, as an incidental aspect of its decision making powers, make decisions about adequacy of consultation or infringement of section 35 rights
 - B.C. Forest Appeals Commission Paul (SCC)
 - B.C. Utilities Commission Kwikwitlem (BCCA)
 - National Energy Board Brokenhead (FC)

Dispute Resolution

- Problems with proposed dispute provisions is that certainty opportunity is lost
 - Dispute body is recommendatory only which means that adequacy of consultation can be challenged in Court (slow and uncertain)
 - Case law supports permitting the Commissioner to make decisions about adequacy of consultation or infringement of section 35 rights as an incidental aspect of the Commissioner's jurisdiction (expeditious and reviewable on reasonableness)

Community Based Land Use Plan

- Act provides
 - Community Based Land Use Plan (“CBLUP”) to be defined by regulation (section 1)
 - No mining claim to be staked or recorded in the Far North where inconsistent with CBLUP (section 30)
 - No new mine in the Far North if inconsistent with a CBLUP or if no CBLUP exists (section 204)

Community Based Land Use Plan

- BC Experience – Haida Gwaii Land Use Plan
 - Initiated in 2001
 - During discussions, 23% of land base removed from logging
 - Approved in 2007
 - Removed 50% of the land base of Haida Gwaii from logging
 - Logging issues still not settled

Community Based Land Use Plan

- BC Mid Coast and North Coast Land Use Plan
 - Mid Coast initiated in 1999
 - North Coast Initiated in 2001
 - North Coast Recommendations made in 2004
 - Harmonization with First Nations Land Use Plans still being implemented
 - Agreement reached on protected areas for North Coast and Mid Coast in 2006
 - Of 6.4 million ha, 1.8 million ha protected

Community Based Land Use Plan

- In light of BC Experience
 - Prevention of new mine opening until CBLUPs are finalized will sterilize the Far North from new mine openings to the detriment of the aboriginal communities and industry
 - Proposal in Far North Act to establish 225,000 sq km protected area as part of CBLUP certain to meet opposition from First Nations and other northern communities

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