

Saugeen First Nation and Chippewas of Nawash Unceded First Nation v Ontario Ministry of Natural Resources and Forestry and T & P Hayes Ltd., 2017

Saugeen Ojibway Nation (SON) case: ONSC 3456, released 14 July 2017:

The Ontario Ministry of Natural Resources and Forestry (MNRF) breached the Crown's duty to consult by issuing a licence to a company to mine limestone in two First Nations' traditional territory, the Saugeen First Nation and Chippewas of Nawash Unceded First Nation. The Court set aside the Minister's decision to issue the licence.

Background:

In 2008, T & P Hayes Ltd. applied for a licence to open and operate a limestone quarry next to lands under claim by SON. MNRF predetermined the scope of the project to be "low" and thus provided no effective notice regarding the application until 2011. Subsequently, the MNRF changed its position several times: denying SON's right to be consulted, then admitting SON's right to be consulted, denying funding, then agreeing to partial funding, then not responding to SON's acceptance of funding, and reverting back to the position that no consultation was due. By 2013, MNRF agreed there was a duty, and delegated aspects of consultation (including funding for SON to participate in consultation) to T&P Hayes.

T&P Hayes objected, telling MNRF that it refused to engage directly with SON. MNRF decided not to enforce the process it had delegated to T&P Hayes. No one advised SON. In 2015, MNRF informed SON that consultation was complete, that all of SON's substantive concerns were resolved, and that MNRF would provide funding to SON in exchange for an invoice of peer reviews that hadn't yet happened.

SON refused to sign and insisted that proper consultation was required. MNRF confirmed that consultation was complete, and without notifying SON, issued the licence in July 2016.

Decision:

Asking SON to identify specific concerns before consultation had occurred was not a correct process (para. 73).

T&P Hayes was not obliged to accept delegation of consultation, but did so at risk of delaying its own project (para. 121 (5)).

MNRF must follow its own consultation process and tell the First Nations if the process changes and why (para. 121(7)).

MNRF breached the Crown's duty to consult when it changed its previous position about providing funding (para. 121(8)).

Scope of project was "medium"; therefore, MNRF was required to provide formal notice, information, peer review funding, and accommodate of SON's concerns (paras. 141-142).

Even without a statutory requirement to consider cumulative effects, it is a proper subject of consultation (para 154-155).

"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 the 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" (para 159).

Implications:

The Court addressed several matters vital to First Nations who seek to protect their rights to be adequately consulted and accommodated.

There needs to be a clear and coherent process.

There must be capacity and funding to participate in consultation. This may include legal costs and peer reviews, funded by the Crown &/or proponent.

First Nations often receive countless requests for consultation. When a project does not benefit the First Nation financially, the demands of participating in consultation can strain its ability to provide other necessary community services. It is reasonable for a First Nation to take the position that it should not have to pay for the Crown to fulfil its constitutional obligations.

Source:

- Abridged from Maggie Wentz, OKT in *The View From One Canadian, Consultation funding and a fair process required to meet consultation obligations*

<https://barbkueber.wordpress.com/2017/07/20/duty-to-consult-and-decision-to-fund/>

Images:

Map: Traditional Territory of SON <http://saugeenojibwaynation.ca/>

<https://nationalpost.com/news/national/ontario-court-halts-quarry-project-over-lack-of-consultation-with-first-nations>

Prepared for Shared Path Consultation Initiative by David Stinson, RPP.