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APPLICATION FOR LIMESTONE QUARRY LICENCE SET ASIDE FOR FAILURE TO HAVE 'MEANINGFUL CONVERSATION' WITH FIRST NATION

By Stanley D. Berger

In a decision released by the Ontario Divisional Court on July 14, 2017, the Saugeen Ojibway First Nation (SON) was successful in challenging a limestone quarry licence issued by the Minister of Natural Resources and Forestry to the Proponent T&P Hayes Ltd. (citation: *Saugeeen First Nation v Ontario (MNRF)*, 2017 ONSC 3456)

The significance of the decision in the expanding catalogue of judicial precedents on Aboriginal consultation lies in the Court's detailed analysis of the deficiencies in the Crown consultation. These deficiencies follow:

- Notice of a proposed project pursuant to a general statutory notice requirement such as that under the Aggregate Resources Act does not amount to notice to an affected First Nation.
- Proof that a Project came to the attention of a member of the First Nation does not prove that Project Notice reached the First Nation. A member could reasonably, but mistakenly assume that the Project was already known to the First Nation or in the case of SON, their Environmental Office.
- The duty to consult includes a duty on the Crown, not a potentially affected First Nation, to complete an initial assessment of whether a duty to consult arises, the scope of that duty (i.e. low, medium or high) and any duty to accommodate.
- A proponent is not required to undertake a delegated consultation, though the proponent runs the risk that its refusal to assume the role may adversely affect its licence application. Regardless of whether the proponent undertakes the consultative delegation, the Crown is not relieved of ensuring that adequate consultation takes place.
- The Crown's preliminary assessment, along with the reasons for its assessment must be disclosed to the First Nation.
- The fact that a project is not being undertaken on Crown lands does not in and of itself dispense with any requirement for Crown consultation.
- When Crown consultation comes before the Courts for review the Crown's witnesses "should be scrupulous in their efforts to characterize the record and the evidence fairly." "The honour of

the Crown is always engaged." (par.70)

- Once specific concerns are raised – in SON's case these included hydrogeologic questions, concern that archaeological errors in the past had led to disruption of ancient burial sites, additional concerns with disruption to wildlife corridors that could impact rattlesnakes, deer and other species - a structured response from the Crown is required consisting of establishing a consultation process. That process must be the subject of a dialogue between the affected First Nation and the Crown consistent with the required scope of consultation.
- A meaningful dialogue requires that the Crown be satisfied that any technical reports and documentation taken into account by the Crown have received an informed review by affected First Nation. The Crown should have reasonable confidence that the First Nation has specific funding to engage experts to review the relevant technical reports, advise on possible adverse impacts and propose further substantive mitigation measures, before concluding that the proponent had addressed all outstanding environmental concerns and that further technical reviews are unnecessary.

  "...The expense of consultation arises as a result of a 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." (par. 159)

In a footnote to this statement (146) the Court went on to acknowledge that:

> *"...It would not seem reasonable to expect SON to fund consultation costs, including legal costs, from general band revenue."*

- It is open to the Crown on principled grounds to reject a request for funding and decide that a First Nation did not require expert assistance to participate adequately in consultations. Ultimately such a decision would be reviewed by the court on a standard of reasonableness. (at par. 127)