

Some Recent Cases Pertinent to Industry in Saskatchewan



**Law Society
of Saskatchewan**

Dwight Newman, QC
University of Saskatchewan College of Law



Topics

1. Carbon Tax Reference
2. Other Recent Federalism Cases of Interest (Pipelines)
3. Some Pertinent Conflict of Laws Cases
4. Some Notable Developments on the Duty to Consult
5. Implications



Carbon Tax Reference

- Prominent upcoming case – SCC hearing Sept 22-23, 2020
- Saskatchewan the first province to challenge *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186
- February 2019 hearing at Saskatchewan Court of Appeal led to Saskatchewan decision – *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40
- Ontario decision – *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544
- Alberta decision – *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74



Other Recent Federalism Cases of Interest (Pipelines)

- *Reference re Environmental Management Act*, 2020 SCC 1 – summary dismissal of appeal from BCCA decision (2019 BCCA 181) rejecting BC’s legislative attempts to interfere with Trans Mountain pipeline
- *British Columbia (Attorney General) v. Alberta (Attorney General)*, 2019 FC 1195 – BC wins temporary injunction from Grammond J. against Alberta legislation that could have been used to limit oil flows (adopted contemporaneously with the BC legislation)
- Larger pattern of conflict over pipelines – large attempts to assert provincial or even municipal authority over interprovincial pipelines been rejected (exciting times for s. 92(10) aficionados!)
- *Coastal GasLink Pipeline Ltd. v. Huson*, 2019 BCSC 2264 – not federalism as usually described but about Indigenous law in context of injunctions

Some Pertinent Conflict of Laws Cases

- *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 – majority of SCC permits Quebec courts to adjudicate in Aboriginal title case even where they may end up being implications for land in Newfoundland and Labrador
- *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 – majority ruling summarized as: “Customary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not ‘plain and obvious’ to me that the Eritrean workers’ claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed.” [132]



Some Notable Developments on the Duty to Consult

New Limits on the Duty to Consult?

- *Coldwater v. Canada*, 2020 FCA 34 (leave to appeal to SCC denied in July) – final consultation issues on Trans Mountain Pipeline, with recompleted consultation process sufficient
- Note: FCA’s engagement in case management, Court writing about duty to consult to be neither a legal nor de facto veto, application of Vavilov framework
- *Athabasca Chipewyan First Nation v. Alberta*, 2019 ABCA 401: “it cannot be presumed that a First Nation suffers an adverse effect by a taking up anywhere in the treaty lands. A contextual analysis must occur to determine if the proposed taking up may have an adverse effect on the First Nation’s rights to hunt, fish and trap. If so, then the duty to consult is triggered.” [61]



Notable Developments on the Duty to Consult...

One New Limit on the Duty to Consult Rejected

- *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215 – claim by Gitanyow hereditary elders for consultation in context where prior discussion of possibility modern treaty with Nisga’a might override

“[t]here may be circumstances where accommodation of the claimed right cannot be achieved without interfering with an established treaty right” [67] – but case concludes that duty to consult is not blocked by the existence of a modern treaty agreement with another Aboriginal community

Notable developments on the duty to consult...

New applications of duty to consult?

(1) *Nova Scotia (Aboriginal Affairs) v. Pictou Landing First Nation*, 2019 NSCA 75 – duty to consult triggered by funding decision for new effluent treatment facilities in circumstances of case

(2) *Squamish Nation v. Canada*, 2019 FCA 216 – duty to consult triggered by Squamish request for increase in fishing allocation

Doctrine whose development continues to evolve in new ways

Implications

- Some Indigenous rights litigation in Saskatchewan [eg *Michel v. Canada (Attorney General)*, 2019 SKQB 334 – headed to CA on Peter Ballantyne Cree Nation’s claims; Metis land rights claim in northwest Saskatchewan (with challenge vs the claimants from Metis Nation of Saskatchewan); etc]
- But a lot of broader case law on constitutional, conflict of laws, and duty to consult issues that could bear on Saskatchewan in other ways – increasingly complex legal environment for industry and for lawyers advising industry



Questions?

Dwight Newman, dwight.newman@usask.ca

