

Constitutional Law – Practice Question and Answer

Session: Aboriginal Rights

Topic: Duty to Consult

Recommended time: 1 hour 30 minutes

Score: 100 Marks

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QUESTION

Millennium Quarries Inc. (MQI) was incorporated in 2015. Last year, the company applied to the Ontario Ministry of Natural Resources and Forestry for a license to operate a quarry in Odawa. The company's plan is to carry out rock blasting in the Cayuga community and transport the boulders to its quarry in Odawa which is to sit on an estimated 35 hectares of land.

On getting wind of this application, the Odawa First Nation immediately filed an objection with the Ministry, contending that the 35 hectares of land on which the proposed quarry was to be built belongs to the Odawa indigenous community. They assert that though there was no treaty in respect of their land, they have continually occupied the vast area of land for several hundreds of years without any break, up till today. They have farmed on the wide area of land and fished the surrounding rivers. They claim that granting license to MQI would deprive them of their land.

For the Cayuga First Nation, rock blasting on their land is a no-no. This is because the noise and vibration will scare away wildlife and leave the people without their traditional source of livelihood, which is hunting deer. Of utmost importance is that the white-tailed deer is not only the mainstay of the local economy but also a religious symbol for the community. The breeding season of the white-tailed deer has special religious significance for the community in that some of their most important traditional religious festivals are held at this period to pray for the prosperity of their community. These religious ceremonies are of such importance that the Cayuga Chief at the time of European

contact insisted that it be included in the treaty of 1879. The treaty did recognise the right of the Cayuga people to hunt and trap for food as well as conduct their religious ceremonies on the land.

The Minister of Natural Resources and Forestry considered the two objections. The summary of her decisions are as follows:

- a. As regards the claim by Odawa, there is no treaty or documentary evidence to back up their claim of title to the land. As a matter of fact, the Minister noted that the Odawa First nation is formally raising this claim of ownership for the first time ever though she read about it in the newspaper many years ago. Having considered the circumstances of this matter, the Crown in the right of Ontario owes no fiduciary duty to the Odawa people. MQI can proceed with the construction of the quarry.
- b. As regards the claim by the Cayuga First Nation, the existence of the Treaty of 1879 imposes an obligation on the Crown to consult with the people, even though this treaty is yet to be proved. The Minister then invited the representatives of the Cayuga First Nation and MQI to submit their memoranda and evidence for consideration.

At the end of the deliberations with MQI and the Cayuga First Nation, the Minister decided that the submissions from MQI clearly shows that all the concerns of the Cayuga First Nation have been dealt with and adequate provisions made to accommodate their social, economic and religious concerns.

The Odawa First Nation is dissatisfied with the Minister's decision and wants to seek judicial review including a declaration that the Crown and MQI owe the community the duty to consult.

The Cayuga First Nation is also dissatisfied, claiming that the Minister was bound to agree with their submissions by virtue of the Treaty of 1879.

Representatives from both Odawa and Cayuga have now consulted your principal who has asked you to prepare a legal opinion on this matter.

Draft your legal opinion.

HIGHLIGHTS OF THE ANSWER

The issues here are as follows:

- 1) whether the Crown owes the Odawa First Nation the duty to consult and accommodate
- 2) Whether the Crown owes the Cayuga First Nation the duty to consult and accommodate
- 3) Whether the duties have been discharged.

Issue (1): whether the Crown owes the Odawa First Nation the duty to consult.