

## **Foundations of Canadian Law – Practice Question and Answer**

**Session:** Indigenous Peoples and the Law

**Topic:** Aboriginal Rights

**Sub Topic:** Independent Third Parties and Crown's Duty to Consult

**Recommended time:** 45 Minutes (10 minutes reading time)

**Score:** 25 Marks

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### **Question**

You are an articling student in the law firm of Jacob Bigaels LLP. Your principal informed you before lunch that he wanted you to participate in a briefing coming up at 4.00p.m.

Present at the said briefing were representatives of the Squamish Nation, a band comprising over 4,413 registered members whose traditional territory extends from the Lower Mainland of British Columbia to Squamish Valley. Their grouse is that Abella-Green Coal Corp. sought to reopen an old coal mine and had applied to the provincial government. Part of the reopening plan will include constructing an access road through a portion of the Squamish Nation's territory, which according to the representatives would adversely impact their traditional activity of hunting buffalos. They claimed that hunting buffalos is not only for survival but also has significant religious essence, with different buffalo-themed religious festivals held to celebrate the beginning of each month. They are of the strong belief that mechanical disturbance from the coal mining activities as well as vehicular traffic from the proposed road will drive the animals into the wild and thus hamper their traditional, religious and cultural practices.

Upon the objection of the Squamish Nation, the matter was referred to the Mining Mediator who later forwarded a recommendation to the British Columbia Ministry of Energy, Mines and Low Carbon Innovation (Ministry). The Mediator recommended that the project be approved, concluding that the objection of Squamish Nation should be discountenanced as it has no basis in law and in fact. The BC government, claiming it had thus fulfilled its duty to consult, relied upon this recommendation and approved the reopening immediately, insisting that the Squamish Nation was not entitled to accommodation since their title to the territory was yet to be asserted.

The representatives of the Squamish Nation are aggrieved that the Mediator did not even give them the opportunity to air their grievances about the environmental impact of the proposed project on their claim before the Mediator's recommendation. Your principal sought to know if the Squamish Nation's claim of title to this territory has been asserted or recognized, to which they replied that their claim is still being negotiated with the provincial government.

At the end of the briefing, your principal requested you to come up with a legal opinion on whether the Crown had fulfilled its duty to consult to the required constitutional standards. He told you not to bother about the content of the duty and suggested that a look at the regulation setting up the mining mediation procedure might be of help.

You researched the Mineral Tenure Act, and section 65, relevant to mining mediation provides as follows:

Section 65 -

- (1) The Minister may appoint a Mining Mediator under this Act for the purpose of settling disputes in relation to any application for mining of natural resources.
- (2) Upon conclusion of mediation, the Mediator shall submit a report to the Minister detailing the claims of each party and the agreement, if any, reached at mediation.
- (3) The Minister shall upon receipt of the mediation report forward same to the Regulatory Management and Enforcement Commission for a final decision.
- (4) Notwithstanding anything to the contrary in sub-section (1) above, the powers of the mediator so appointed shall be limited to settling the dispute between the parties, and where such settlement fails, the mediator shall provide to the Minister a written report of the efforts made at settlement.

Provide a draft of your legal opinion.

Notes:

*This question relates to the Crown's duty to consult Aboriginal peoples but from a different perspective, viz: there are certain situations where an independent third party may be taken to have undertaken consultation which the Crown can rely upon as the fulfillment of its own duty. This third party could be an agency, a commission or tribunal set up by the Crown. The law is that once the consultation undertaken by that independent 3<sup>rd</sup> party meets with the required standards, then the Crown will be taken as having fulfilled its duty to consult.*

*However, two requirements must be met before the consultation by the third party will even be considered as sufficient at all. They are that:*