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"DD West LLP proud to represent Peguis First Nation concerning International Power Line"

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The duty to consult – a constitutional imperative in Canada – flows from the Crown's assumption of control over natural resources that were once under the total sovereignty of Aboriginal peoples. The Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 remarked the following about the Crown's duty to consult:

> [25] Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many [First Nation] bands reconciled their claims withthe sovereignty of the Crown through negotiated treaties.... The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

The term "the Crown" is used in constitutional law to symbolize the power of the federal government or provincial governments in Canada. So, what happens when the Crown fails or choses not to consult? Facing such a situation, Aboriginal peoples turn to judicial review proceedings – a process by which courts decide whether the Crown adequately discharged its duty to consult before authorizing projects to begin.

Brian J. Meronek Q.C. and Jeremy W. McKay of DD West LLP recently appeared for Peguis First Nation ("Peguis") on a judicial review proceeding in the Federal Court of Canada (the "Court"). The judicial review proceeding concerned the failure of the federal government ("Canada") to discharge its duty to consult Peguis before approving the Manitoba-Minnesota Transmission Project ("MMTP").

As its name would suggest, the MMTP is an international power line that exports electricity from the Province of Manitoba to the State of Minnesota in the United States of America. The MMTP is constructed by The Manitoba Hydro-Electric Board ("Manitoba Hydro") and needed Canada's authorization because of its international character. The geographical location of the MMTP includes Treaty No. 1 land and areas of cultural significance to members of Peguis. As such, a "deep" or "high" level of consultation was owed to Peguis before Canada authorized the MMTP.

For the MMTP, Canada relied on a three-phase consultation process: (1) Government of Manitoba's consultation: (2) National Energy Board's hearing process; and (3) Canada's supplemental consultation. Canada's inadequate implementation of the latter phase was the main subject of Peguis' concerns.

"Several concerns were raised including Canada's lack of consultation with Peguis," said Chief Glenn Hudson of Peguis. "DD West LLP was engaged as Peguis' litigation counsel after Canada authorized the MMTP over Peguis' objections."

In Court, DD West LLP advanced on behalf of Peguis two principal positions. One — Canada in fact failed to fulfill the substantive requirements of the duty to consult in relation to Peguis during the supplemental phase of the consultation process (the "constitutional law issue"). Two — Canada's written reasons to Peguis were 'unreasonable' pursuant to the requirements of administrative law (the "administrative law issue"). Both grounds were accepted by the Court in its reported judgment and reasons: *Peguis First Nation v. Canada (Attorney General)*, 2021 FC 990.

The Court's decision on the constitutional law issue is straightforward. The Court observed that Canada "does not dispute that it never actually met and discussed Peguis' outstanding substantive concerns" during the supplemental consultation. Under cross-examination by Brian J. Meronek, Q.C. on behalf of Peguis, it was indeed agreed to by Canada's representative that "no meaningful consultation took place" between Canada and Peguis. The Court remarked:

[147] … The problem, in short, is that in this case, Canada's consultation with Peguis was a monologue, rather than a dialogue.

The Court's judgment on the administrative law issue is more nuanced. In short, the Court agreed with Peguis' submission that Canada "[did] not show how concerns heard from Peguis were considered in and impacted the outcome during the supplemental consultation because that process did not occur." In the result, the Court ruled that Canada failed to issue written reasons to Peguis that amounted to the administrative law standard of "transparent, intelligible, and reasonable" reasons.

On the Court's ruling Brian J. Meronek, Q.C. observes the following: "*The Court's judgment reaffirms that the Crown cannot abdicate its duty to consult after creating a consultation process, inviting Aboriginal peoples to participate in that process, and then allow for some arbitrary amount of time to fritter away. Clearly, the modern duty to consult demands, and Aboriginal peoples deserve, more from the Crown. The Crown – at all "phases" of the consultation process – is required to take steps to adequately implement the duty to consult in a substantive way; not merely paying lip service to its constitutional obligations.*"

The next step is for Canada to comply with the Court's recommendation to engage in further consultation with Peguis and discuss accommodation measures. At the time of this article, Canada has indeed written to Chief Glenn Hudson of Peguis to resume consultations.