

Risks surrounding post-report consultation: Indigenous Law Insights November 2022 (webinar)

NOVEMBER 29, 2022 2 MIN READ

Related Expertise

- [Indigenous](#)
- [Regulatory](#)
- [Regulatory, Indigenous and Environmental](#)

Author: [Sander Duncanson](#)

In the final session of Osler’s Indigenous Law Insights webinar series for 2022, Sander Duncanson, partner and Co-Chair, and Jesse Baker, associate, Regulatory, Indigenous and Environmental, discussed the duty to consult and accommodate. Specifically, they explored issues that can arise after the regulatory process has begun on a project, as well as consultation required on supplemental permits for already-approved projects.

Post-report consultation refers to consultation with Indigenous groups that occurs after a regulator’s review but before a government makes its decision on a project with that regulator’s report. At the federal level, this trend began with the Northern Gateway Pipeline project. There, the Federal Court of Appeal found: “Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the material concerns raised.”^[1]

Since then, the federal government has continued to conduct post-report consultation with Indigenous groups after most federal regulatory reviews, even though it may not actually be legally required. In practical terms, this has meant the possibility of reopening regulators’ technical findings without a full consideration of the record and with minimal (if any) input from the project proponent. It has also created new risk, as each phase of Crown consultation must be “meaningful” and can be successfully challenged.

A key question arising out of this trend is how courts can balance the duties to consult and accommodate with procedural fairness requirements. In *Taseko Mines Limited v. Canada (Environment)*, Taseko alleged that the post-report consultation process was unfair, but the Court found that the proponent was owed minimal procedural fairness. Several facts in that case are distinguishable, but while the duty to consult is a constitutional imperative (unlike the duty of procedural fairness) and may require some asymmetry, Sander says, current practices will likely lead to future legal challenges by proponents, especially if the ultimate regulatory outcome is affected.

[Watch the full webinar](#)

[1] *Gitxaala Nation v. Canada*, 2016 FCA 187, para. 279.