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The Regulator's Duty of Fairness in Mining Development

Mining Law 2017 – CLE BC

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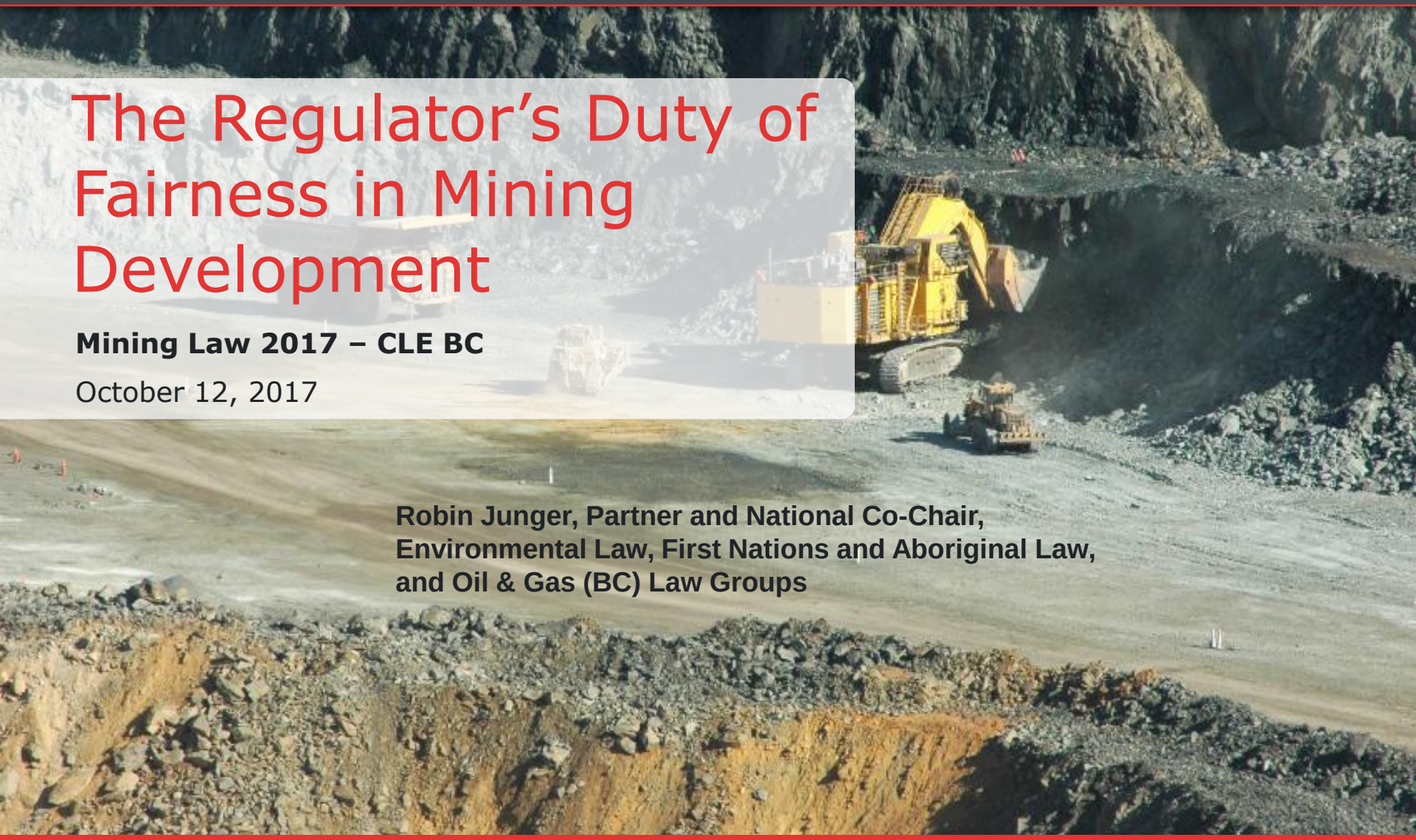

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Introduction

- Why is this important?
- Why are people often reluctant to talk about it?
- Is there a developing trend?

Principles of administrative fairness

These principles require that, where a statutory decision-maker is making a decision that affects the interests of a party, that party:

- has the right to present information and submissions
- has the right to challenge the information and submissions of other parties
- has right to know the test or standard that will be applied

"*Fairness requires that a party who will be affected by a decision must first be informed of the case to be met. Without knowledge of the matters in issue one cannot effectively exercise one's right to be heard. Disclosure enables a party to review the alleged facts, to prepare to challenge them with evidence that rebuts them or reduces their impact and to prepare submissions explaining how they should be weighed and analyzed. …*

It is especially important that disclosure be made of any information which may be prejudicial to the party's interests and which will be put before the decision maker."

Sara Blake, *Administrative Law in Canada, 5th Edition, LexisNexis Canada Inc., 2011*

Specific steps required will vary

The nature of the duty that arises under administrative law is governed by three factors:

1) the nature of the decision to be made;
2) the relationship between the decision maker and the party who asserts its right will be affected by the decision; and
3) the actual effect of the decision upon those rights.

> *The decision here is not one made by a tribunal that decides upon evidence tendered before it, but rather by a statutory authority charged with the responsibility of issuing permits for forms of economic activity …*
>
> *… this was not a process of a tribunal that would hear evidence, submissions and then make a determination. It was a process of administrative decision-making established under a statutory scheme. There were no litigants and no hearing.*
>
> *Nevertheless the process requires procedural fairness. The extent of that will be determined by the nature of the decision making process that arises under the statute…. (**Cameron v. Ministry of Energy and Mines, 1998 CanLII 6834 (at paras. 167-191))***

Where does it apply in the mining context?

Any statutory decisions including:

- *Mines Act,*
- *Mineral Tenure Act*
- *BC Environmental Assessment Act*
- *CEAA, 2012*
- *Fisheries Act,*
- *Environmental Management Act*

As a principle of common law, it can only be ousted by *express legislative intent (Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), [2001] 2 S.C.R. 781)*

Can there be exceptions to the requirement to be fair?

- Case law is clear that exceptions to procedural fairness can occur
- But must be based on compelling and extraordinary circumstances
- It is not enough to assert a submission is “confidential”, or that hearing one’s view would not likely have changed the decision

Pacific Booker v. British Columbia (Environment) (2013 BCSC 2258)

- Involved a lengthy and complex EA process regarding the proposed Morrison Mine
- Court summarized the issue as follows:

> My understanding of the petitioner's position is … the process employed for applying for a certificate in this instance was fundamentally unfair. It placed the petitioner in the invidious position that, even though it had met the criteria for success in obtaining a certificate, and had been informed that the report to the ministers would conclude that the project posed no unacceptable environmental hazards, the executive director's recommendation to the ministers to refuse the certificate, on other criteria, unknown and unknowable to the petitioner before the decision was made, was *ultra vires.* (para 5)

Pacific Booker v. British Columbia (Environment) (2013 BCSC 2258)

- Court considered the nature of the statutory scheme, the interests at stake, the impact of the decisions and other relevant factors. Went on to say this:

> *[The Petitioners] complaint is that in the final crucial stage of the referral to the ministers, when the executive director firmly put his thumb on the scale, the petitioner could not see that he had done so, let alone given the opportunity to attempt to restore the balance. (para 148)*

Pacific Booker v. British Columbia (Environment) (2013 BCSC 2258)

Conclusion:

The petitioner is entitled to a declaration that the executive director's referral of the application for a certificate to the ministers and the ministers' decision refusing to issue the certificate ***failed to comport with the requirements of procedural fairness.*** *There will be an order in the nature of certiorari* ***quashing and setting aside the ministers' decision*** *and an order* ***remitting the petitioner's*** *application for a certificate to the ministers for reconsideration (emphasis added)*

Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53

- Cased related to First Nation claim that Aboriginal consultation was inadequate when government made a decision to issue a permit to an applicant (Mr. Paulson)
- Raises important question of how government's duty of procedural fairness to the applicant co-exists with the Crown's duty to consult First Nations

Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53

I believe the existence of Larry Paulsen's stake in this situation is of considerable importance... Mr. Paulsen made his application as an ordinary citizen who was **entitled to a government decision reached with procedural fairness** within a reasonable time. …

While **procedural fairness is** a flexible concept and takes into account the Aboriginal dimensions of the decision facing the Director, it is nevertheless **a doctrine that applies as a matter of administrative law** to regulate relations between the government decision makers and all residents of the Yukon, Aboriginal as well as non-Aboriginal …

It is impossible to read the record in this case without concluding that the Paulsen application was simply a flashpoint for the pent-up frustration of the First Nation with the territorial government bureaucracy. However, the result of disallowing the application would simply be to let the weight of this cumulative problem fall on the head of the hapless Larry Paulsen…**This would be unfair.** (paras. 35, 79-80) [emphasis added]

How might other administrative fairness issues arise in the duty to consult context?

- Crown receives submissions from Aboriginal groups in confidence, and applicant is unable to respond
- Crown develops accommodation measures with Aboriginal groups, without giving the applicant an opportunity to comment on them
- Crown makes agreements to do things for Aboriginal groups that will affect rights of mining companies

China Minerals Mining Corp. v. British Columbia (Minister of Forests, Lands and Natural Resource Operations) (Unreported reasons, January 17, 2017, S160923)

- Case involved the 2013 "incremental treaty agreement" between BC and Kaska Dena to transfer certain lands to Kaska before the treaty process was complete
- Lands were directly over China Minerals mineral claims and First Nation planned a power project
- The transfer of lands required the exercise of a statutory power
- China Minerals said it was not consulted and this violated procedural fairness

China Minerals Mining Corp. v. British Columbia

- BC and Kaska disagreed with the company – disputed whether a duty of procedural fairness was owed and whether it had been breached
- The case was to be heard in January 2017
- In December 2016, BC advised China Minerals that the lands would be transferred back to BC
- The transfer took place 10 days before hearing
- China Minerals sought to have the Court proceed with hearing but BC and Kaska objected on mootness grounds

China Minerals Mining Corp. v. British Columbia

- The Court noted as follows:

  The petitioner says it is important for this Court to determine whether the government has an obligation to consult non-aboriginal parties whose interests may be affected by treaty negotiations and whether any such obligation is enforceable through judicial review.

- The Court declined to proceed, given that is would amount to an "advisory opinion" and given limited judicial resources (noting there were 10 vacancies on the Court)

China Minerals Mining Corp. v. British Columbia

- The Court did acknowledge there is a complex issue in terms of how the duty to consult Aboriginal groups relates to the rights of third parties, and what role the Court will play

  [18] In pursuing its constitutionally-mandated duty of reconciliation with First Nations, the Province will be required to make policy and perhaps legislative decisions about how to deal with the interests of non-aboriginals that may be affected. That delicate balancing is a task that, at least at first instance, must be left to those who have been elected to make the decisions. The courts may, at some point, be required to establish a framework for that consideration based on rights the government must respect, but the extent of the court's intervention will be dictated by the specific issues raised in the cases that come before it. In my view, it would be inappropriate to give what would in effect be an advisory opinion in the absence of a real controversy to be resolved.

Taseko Mines v. Minister of Environment (Federal Court File No. T-744-14 and T-1977-13)

- Two judicial review applications filed in respect of the federal environmental assessment of the proposed New Prosperity project
- Judicial review #1 relates to the panel process and includes procedural unfairness claims associated with the hearing process
- Judicial review #2 relates to subsequent decisions of the federal minister and Cabinet. Involves procedural unfairness claims related to communications between First Nation and minister / senior officials.
- Cases heard together in January 2017 and judgment is under reserve
- Decision may provide further guidance on the relationship between the Crown's duty to consult Aboriginal groups and administrative law principles of procedural fairness

Practice management tips and ethical considerations

- Help regulators frame the issues appropriately from the outset and draft submissions accordingly
- Do not be shy about citing procedural fairness principles and preventing unfairness before it happens
- Acknowledge that there can be differences as to what procedural fairness requires in each case – not suggesting regulators are unfair people

Practice management tips and ethical considerations

- Know when to engage government lawyers under the Code
  - 7.2-6 Subject to rules 7.2-6.1 and 7.2-7, if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer:
    a) approach, communicate or deal with the person on the matter; or
    b) attempt to negotiate or compromise the matter directly with the person.
- Consider non-litigations options wherever possible (e.g. contacting superiors, complaint to Ombudsperson)
- Consider litigation option where truly necessary

Questions?

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