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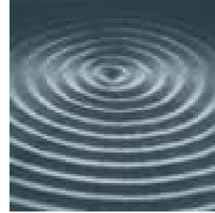

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CONSULTATION IN BRITISH COLUMBIA IN THE POST *HAIDA NATION* AND *TAKU RIVER TLINGIT* ERA

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A. INTRODUCTION

The Supreme Court of Canada's decisions in *Haida Nation v. British Columbia (Minister of Forests)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* have provided some much-needed guidance in relation to the nature and scope of governments' obligations to consult with aboriginal groups.

Since the Supreme Court of Canada released its decisions in these cases in November 2004, the British Columbia courts have had some opportunities to apply the principles from the decisions and to further delineate the ambit of the duties. Some of these cases are reviewed below.

In the meantime, the British Columbia government continues to implement the consultation policies it has been developing since 2002, and is currently in the process of considering changes to those policies as a result of the Supreme Court of Canada's clarification of issues relating to consultation and accommodation.

B. THE HAIDA NATION AND TAKU RIVER TLINGIT CASES

In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, the Supreme Court of Canada confirmed the following principles:

- governments have a duty to consult with and, where appropriate, accommodate aboriginals prior to proof of aboriginal rights or title where government has real or constructive knowledge of the potential existence of the rights or title and contemplates conduct that might adversely affect the rights or title

- the scope of the duty is proportionate to the strength of the aboriginal rights or title claim being asserted, and to the seriousness of the potential impact of the activity to be undertaken on the aboriginal interests

- governments must carry out meaningful consultation in good faith

- the duty to consult does not include a duty to reach agreement

- First Nations must also show good faith in the consultation process

- consultation does not give First Nations a veto power
- a duty to accommodate arises when the consultation process reveals a strong aboriginal rights or title claim and a likelihood of adverse impact from the proposed activity
- accommodation requires governments to reasonably balance aboriginal interests with other societal interests

C. SOME RECENT CASELAW IN BRITISH COLUMBIA

1. The Musqueam Indian Band Case

The most notable decision of late on consultation issues in British Columbia is the Court of Appeal's decision in *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128. This case dealt with the duty to consult in the context of the British Columbia government's sale of golf course lands located in Vancouver to the University of British Columbia.

The lands in question were adjacent to the University and owned by the Province as part of the University Endowment Lands. They had been used as a golf course for about 75 years. In 1985, a private operator had been granted a 30-year lease of the lands to operate the golf course. In 2000, the Province decided to negotiate a sale of the lands to the University. The University made an offer to purchase the lands in 2002, subject to the subsisting lease. An agreement was reached in December 2002 and in February 2003, the Province issued an Order in Council authorizing the sale.

In 2000, Land and Water British Columbia ("LWBC"), the Provincial agency charged with the responsibility to negotiate the sale, had advised the Musqueam of its intention to sell the lands, but took the position that any infringement to the Musqueam's right had happened long ago and, therefore, the only remedy would be economic compensation. The Musqueam disagreed and pressed for a deferral of the disposition of the lands. LWBC met with the Musqueam in February 2001, but no agreement was reached. In January 2003, LWBC advised the Musqueam of the agreement with the University. The Musqueam commenced a petition shortly after the

Order in Council was passed. The parties agreed to postpone the sale pending the outcome of the petition.

Following the commencement of the petition, LWBC and Musqueam had a number of meetings in an attempt to reach an agreement. However, no agreement was reached.

The Supreme Court of British Columbia dismissed the petition on the basis that reasonable efforts had been made to consult with and accommodate the Musqueam. The Musqueam appealed.

In the Court of Appeal decision, the majority held that the Province's consultation efforts with the Musqueam First Nation had been inadequate, and suspended the provincial Order in Council authorizing the sale of the lands to the University for two years. During that timeframe, the parties are to try to reach an agreement, failing which the parties can return to court to raise any issues that remain outstanding at that time.

In the court below, the judicial review judge had concluded that although the Province had not fulfilled its duty to consult before entering into the agreement of purchase and sale with the University, it had fulfilled its duty subsequent to entering into that agreement. Mr. Justice Hall, for the majority of the Court of Appeal, disagreed with this finding, noting that had the judicial review judge had the benefit of the Supreme Court of Canada's decisions in *Haida Nation* and *Taku River Tlingit*, he would have come to a different conclusion. Mr. Justice Hall made the following comments:

> We now have the benefit of these judgments of the Supreme Court of Canada. I have found helpful the analysis set forth in these cases. What I take from these judgments is the principle that the duty of government to consult and in appropriate cases to accommodate "is part of a process of fair dealing and reconciliation" with an affected First Nation where aboriginal rights or title are in play. The honour of the Crown mandates such an approach.

He then went on to refer to the spectrum referred to by the Supreme Court of Canada – at the one end of the spectrum, where the claim to the aboriginal right is weak or the potential for infringement minor, all that may be required is that the Crown give notice to the band of its plans, disclose information and discuss issues, and at the other end, where there is a strong *prima facie* claim, "deep consultation" aimed at finding a satisfactory interim solution may be required.

Mr. Justice Hall found that the duty owed to the Musqueam "tended to the more expansive end of the spectrum" – the Crown had conceded that the Musqueam had a *prima facie* case for title over the lands, the archaeological consultant retained by the Province had noted that the Musqueam had the strongest case of all the bands in the area, and the potential infringement was of significance to the Musqueam because they were located in an urban area which meant there was very little land base available to them in treaty negotiations.

In this context, Mr. Justice Hall found that the Province had left consultation until a "too advanced stage in the proposed sale transaction". He made the following comments on this issue:

> As McLachlin C.J. noted in *Haida*, there is ultimately no obligation on parties to agree after due consultation but in my view a decent regard must be had for transparent and informed discussion. Of course, legitimate time constraints may exist in some cases where the luxury of stately progress towards a business decision does not exist, but such urgency was not readily apparent in the present case. These lands have been used as a public golf course for a long time, and the *status quo* is not about to change having regard to the extant lease arrangements. The Musqueam should have had the benefit of an earlier consultation process as opposed to a series of counter-offers following the decision by LWBC to proceed with the sale.

Mr. Justice Hall went on to make some comments on the scope of accommodation that might be required in relation to the Musqueam's interests. He noted that the law in relation to accommodation is still developing and that it is "too early to be at all categorical about the ambit of appropriate accommodative solutions that have to work not only for First Nations people but for all of the populace having a broad regard to the public interest."

Nonetheless, he stated that there is a "fair probability that some species of economic compensation would be likely found to be appropriate for a claim involving infringement of aboriginal title relating to land of the type of this long-established public golf course located in the built up area of a large metropolis" and that "this may well be a situation where financial compensation could be found to be an appropriate measure of accommodation".

He disagreed with the Musqueam's position that the Province should be required to accommodate them by developing land protection measures to ensure there is a "bank" of land that could be made available for treaty purposes. Mr. Justice Hall stated that he was not

persuaded that courts should become involved in such considerations, noting that "[t]he treaty process … appears to be an area discrete from litigation involving questions of aboriginal rights and title." Although he did not foreclose the possibility that such an arrangement could be agreed upon in the treaty process, he stated that the issue should be left to the negotiating process.

Given the current dearth of caselaw on the scope of accommodation, Mr. Justice Hall's comments on the issue are of interest. However, he was not speaking for the majority on this issue. Mr. Justice Lowry, who concurred with Mr. Justice Hall in relation to his findings on the consultation issue, did not agree with Justice Hall's comments on accommodation. Mr. Justice Lowry noted that the disposition of the appeal did not require any comment on the accommodation issue, and that there is very little in the decided cases to provide assistance on the degree of interim accommodation required in the given circumstances.

Interestingly, Madam Justice Southin took a very different approach from the majority in her concurring judgment. In her Reasons, she found that the Province's breach of duty related to its failure to accommodate the Musqueam, rather than a failure to adequately consult – she did not even address the latter issue, finding it unnecessary to do so.

Madam Justice Southin accepted the Musqueam's argument that the Province had a duty to accommodate them by preserving Crown land in the vicinity of the Musqueam's reserve for the purposes of treaty negotiations. She stated:

> With some hesitation I pose the issue here thus: Does the honour of the Crown require that the powers of sale exercised in the impugned Order-in-Council not be exercised to dispose of lands claimed by an aboriginal band when, if the power is exercised, there may be little, if any public land left available to be granted to the aboriginal band as part of a treaty settlement? To put it another way, is it a breach of the duty to "accommodate" to do what the Crown proposes to do in this case?
>
> My answer to that question is "yes" in the absence of any pressing countervailing public necessity for the disposition in issue.

If Madam Justice Southin's view of accommodation is adopted by other courts in the future, it has the potential to significantly change not only the way consultation and accommodation is carried out in British Columbia, but also the way treaty negotiations proceed. Indeed, if it is

ultimately found that the Province has a duty to hold certain Crown lands essentially in abeyance pending treaty negotiations, those negotiations may proceed at a much faster pace than has been the case in the past.

2. The Homalco Indian Band and Hupacasath First Nation Cases

The British Columbia Supreme Court has had a few opportunities to implement some of the principles from the *Haida Nation* and *Taku River Tlingit* decisions in the context of judicial review and injunction applications.

In *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, [2005] B.C.J. No. 401, Mr. Justice Powers held that the Province had failed to adequately consult with the Homalco First Nation in relation to an amendment to an aquaculture licence held by Marine Harvest Canada. The amendment to the licence permitted the introduction of Atlantic salmon to a fish farm located close to one of the Homalco First Nation's reserves.

Referring at length to the Supreme Court of Canada's decisions, Mr. Justice Powers noted that the process of consultation and accommodation places obligations on both sides of the discussion, and although the parties are not obliged to reach an agreement, they are obliged to make reasonable efforts in the process of consultation and to "keep an open mind". In the circumstances of the case, he found that the Province had a duty to consult with the Homalco given the Province's actual knowledge of the Homalco's claims of aboriginal rights and title in the area of the fish farm. The basis for the Province's knowledge included information provided through the treaty process, published information about Homalco's traditional use and occupation of its traditional territory, and the Homalco's earlier submissions to the Minister.

As is likely to be the case in almost every proceeding raising consultation issues, the parties disagreed as to the scope and content of the obligation to consult: the Homalco argued that the level of consultation required was on the high end of the spectrum because of the strength of its *prima facie* claim and the serious potential risks to their rights; the Province argued the scope and content of the consultation was at the low end of the spectrum because its decision only related to an amendment to an existing licence.

Mr. Justice Powers held that the level of consultation was somewhere between these two extremes. In making that finding, he made the following comments:

> I agree that matters which have been extensively consulted on in the past do not require a full repetition of that consultation. However, that does not mean that these matters do not continue to be the subject of review and further consultation in light of additional knowledge or information. The fact that there may be some controversy about the new evidence or information provided does not mean that it is not a proper matter of consultation….the present state of knowledge is incomplete, further research is required, and … the approaches to management of salmon aquaculture need to be reviewed and altered as the circumstances dictate.
>
> The issue of siting of a particular aquaculture fish farm is not something that is concluded once and for all. Additional information may require a review of the siting and further consultation with the Homalco.

With respect to the standard of review of the Ministry's decision about the level of consultation required, Mr. Justice Powers referred to the *Haida* case. He concluded that the decision maker did not have any "special expertise over and above that of the court in determining when the obligation to consult arises." As a result, he found that correctness was the appropriate standard of review to determine whether the decision maker had correctly decided whether an obligation to consult had arisen.

Mr. Justice Powers decided it would be unreasonable to order the immediate removal of all Atlantic salmon that had been transported to the fish farm after approval of the licence amendment. Instead, he adjourned the application for judicial review generally and declared that the Minister had, and continues to have, a legally enforceable duty to consult with the Homalco in good faith and to endeavour to seek workable accommodation in relation to the management of the fish farm and the licence amendment. He also ordered that Marine Harvest Canada was to participate "in an appropriate way" in the consultation and provide information subject to confidentiality concerns. In the meantime, he prohibited the addition of any more Atlantic salmon to the site. He also directed that the Ministry was to "approach this consultation with an open mind and be prepared to withdraw its approval of the amendment". He held that the Homalco would be free to return to court if they are ultimately of the view that the further consultation and accommodation is inadequate.

It should be noted that the Homalco had earlier brought an injunction application prior to the hearing of the petition ([2004] B.C.J. No. 2804). Referring to the principles in *Haida* and *Taku River*, Mr. Justice Pitfield granted an injunction to prohibit Marine Harvest Canada from

transporting further Atlantic salmon to the site, but declined to order it to remove those salmon which had been delivered following the approval of the licence amendment. He noted that if the consultation process is to have the meaning the Supreme Court of Canada says it should have, there must be substantive consultation He also commented that "… as the law evolves, means are going to have to be found to determine on a timely basis whether the obligation to consult has been satisfied."

Other First Nations have not been as successful in using the Supreme Court of Canada decisions to obtain injunctions. In *Hupacasath First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 514, Mr. Justice Ross declined to grant an injunction to prevent Weyerhaeuser Company Limited from selling private lands which the Minister of Forests had consented to remove from a tree forest licence. As had been the case on most injunction applications brought in relation to consultation issues prior to the Supreme Court of Canada's decisions, the court in this case declined to grant the injunction on the basis that the balance of convenience did not favour it. In making this ruling, Mr. Justice Ross cited the consequences to Weyerhaeuser's business operations, employees, customers and business partners if the sale could not proceed, the fact that the First Nation had not given an undertaking as to damages, and the Supreme Court of Canada's comment in *Haida* that the Crown's duty to consult and accommodate does not give First Nations a veto.

3. The Okanagan Indian Band Case

The decision of Mr. Justice Sigurdson in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2005] B.C.J. No. 713 is perhaps the most interesting of all the post-*Haida Nation* and *Taku River Tlingit* cases that have been decided in British Columbia. This case involved an application by the Province of British Columbia to discontinue its petition commenced under the *Forest Practices Code of British Columbia Act* (the "Code") to enjoin the First Nation respondents from carrying out logging activities. Although the case does not deal directly with the principles from *Haida Nation* and *Taku River Tlingit*, one of the reasons given by the Province for wanting to discontinue the proceedings was that it had decided to take various steps to consult with and accommodate the asserted interests of the respondent First Nations as a result of those decisions.

The petition has had a long and interesting history of interlocutory rulings, the most notable being an order, ultimately upheld by the Supreme Court of Canada, for advanced costs in favour of the First Nation respondents. An interlocutory order was also made to convert the petition into an action. One of the fundamental issues raised in the proceedings is whether the relevant sections of the Code unjustifiably infringe the First Nations' aboriginal rights.

In the most recent decision, Mr. Justice Sigurdson refused to grant leave to the Province to discontinue the proceedings. Although he noted that leave to discontinue should generally be granted, he found special circumstances which supported leave being denied. In making that finding, he referred to the fact that the issues raised by the First Nation respondents is one of serious public importance, as found by both the British Columbia Court of Appeal and Supreme Court of Canada in the advanced costs application. He also noted that the "driving issue" in the litigation is the First Nations' desire to prove a right to the land in question, not just whether the response of the Crown to asserted, but unproven rights, was appropriate. In addition, he expressed concern that if the proceedings were discontinued and the respondents were required to start a new proceeding to advance their claim to aboriginal rights, the advanced costs issue would have to be revisited.

In the end result, despite the Province's desire to discontinue the proceedings on the basis of its purported plans to make a number of proposals as part of a renewed accommodation process, it is required to proceed with the petition so as to allow the First Nations to advance its aboriginal rights claims, and to continue to fund the respondents in that endeavour.

D. BRITISH COLUMBIA'S CONSULTATION POLICY

In October 2002, following the British Columbia Court of Appeal's decisions in *Haida Nation* and *Taku River Tlingit*, wherein a duty to consult was recognized prior to an aboriginal group proving the existence of its alleged aboriginal rights or title, the Province of British Columbia released its "Provincial Policy for Consultation with First Nations".

In this policy, the Province sets out its approach to consultation with First Nations on aboriginal rights and/or title that have been asserted but have not been proven in court. The policy sets out a number of principles, including that the soundness of the claim will dictate the scope and depth of the consultation, the quality of consultation is of primary importance, consultation should be

carried out as early as possible in the decision-making process, and consultation processes must be carried out in good faith.

The policy also delineates a five-part operational implementation plan: pre-consultation assessment, initiation of consultation (Stage 1), consideration of the impact of the decision on aboriginal interests (Stage 2), consideration of justification of possible infringements (Stage 3) and consideration of opportunities to accommodate aboriginal interests and/or negotiate resolution (Stage 4).

The implementation of the policy has been widely criticized by many aboriginal groups who have complained that, despite its policy, the province has not taken its consultation and accommodation obligations seriously. First Nations take the position that they are usually not given adequate time, information or resources to assess the possible effects of the myriad Crown activities that have the potential to affect their interests.

As a result of the *Haida Nation* and *Taku River Tlingit* decisions, the Province of British Columbia recently commenced discussions with aboriginal groups in British Columbia on how they can work cooperatively together on consultation and accommodation issues. The parties are currently attempting to negotiate a framework agreement and, ultimately, changes to the Province's consultation policy may result.

It should also be noted that the provincial Ministry of Forests has issued a number of other related policies over the last two years, including the Strategic Policy Approaches to Accommodation, Ministry Policy – Aboriginal Rights and Title, and Ministry of Forests Consultation Guidelines. A review of these documents is beyond the scope of this paper. However, copies can be obtained from the website for the Ministry of Forests - Aboriginal Affairs Branch (www.for.gov.bc.ca/haa/Policies.htm).

E. FOREST AND RANGE AGREEMENTS

In the forestry industry, one of the ways that the British Columbia government has attempted to deal with its duties to consult with and accommodate First Nations is through what are known as "Forest and Range Agreements". These agreements are supported by provisions in the *Forestry Revitalization Act*, which was introduced in March 2003. The *Forestry Revitalization Act* took back from licensees 20 percent of the annual allowable cut from replaceable forest licences and

tree farm licences, with the view to allocating forest tenures to First Nations. The Province also appropriated the sum of $95 million for forestry revenue sharing with First Nations over the period 2003 to 2005. The Province is in the process of implementing these provisions and policies primarily through Forest and Range Agreements with participating First Nations.

The Forest and Range Agreements typically provide that the Province will pay the signatory First Nation a specified annual sum of money (which is a *per capita* calculation based on the number of status Indians who are members of the First Nation) and may grant the First Nation forest or woodlot licences. In return, the First Nation must agree that the Province has fulfilled its duties to consult and to seek workable interim accommodation in relation to any economic component of potential infringements of aboriginal rights from logging operations and decisions by the Minister of Forests in the period covered by the agreement. Some consultation is still required in relation to the non-economic (i.e. cultural) components of potential infringements caused by certain types of activities and Ministerial decisions but, for the most part, very few consultation or accommodation obligations remain for the period of the agreement.

As of December 2004, the Province had entered into 35 Forest and Range Agreements with First Nations across the Province.

The signing of Forest and Range Agreements is a controversial issue and has been the subject of at least one court challenge. In *Gitxsan First Nation v. British Columbia (Minister of Forests)*, [2004] B.C.J. No. 2714, the First Nation petitioners sought declaratory relief in relation to a Forest and Range Agreement (the "Agreement") proposed in the midst of consultation and accommodation mandated by an earlier decision of the Supreme Court of British Columbia in relation to the Minister of Forests' approval of the change of control of Skeena Cellulose.

The First Nations sought declarations from the court in relation to the alleged continued failure of the Province to adequately consult and seek accommodation with them, as well as declarations that the terms of the proposed Forest and Range Agreement breached the Minister's duty of consultation and accommodation.

The First Nations complained that the Minster failed to take into account the specific nature of their right by refusing to deviate from the standard form of Forest and Range Agreement. The Province's stated position was that the only areas it had room to negotiate were the topics of

specific elements of forest tenures and process elements in connection with non-economic components. In other words, the Forest and Range Agreement was, in essence, a "take it or leave it" document.

The First Nations also challenged the appropriateness of a *per capita* calculation based on the number of its members who are status Indians. Their position was that the calculation should be based on the volume of timber harvested in their territory. In the alternative, they argued it should be based on the number of members of their traditional houses, regardless of whether they are status Indians, since aboriginal rights belong to all aboriginal people, not just status Indians.

Mr. Justice Tysoe granted a declaration that the Province had not yet fulfilled its duty of consultation and accommodation, but refused to grant any declarations in relation to the Agreement. He held that the proposed Agreement dealt with matters beyond the change of control of Skeena Cellulose. As a result, the Agreement was not relevant to the adequacy of the Province's consultation and accommodation efforts.

He did, however, make some comments of note in relation to the proposed Agreement. Firstly, he stated that he did not find the Province's overall approach unreasonable – he noted that the Province did not attempt to force the Agreement on First Nations. On the other hand, he also stated:

> I can understand the reluctance of the Gitanyow to effectively waive the non-cultural aspect of the duty of consultation and accommodation for a five year period in exchange for a monetary payment. The amount of the payment is established in advance, but the degree and nature of the infringements of Aboriginal interests over the five year period is not known. The Gitanyow have a business decision to make: is the offered monetary payment adequate to compensate them for the anticipated infringements and the risk that there could be other infringements during the five year period?

This case raises some interesting issues. Although signing a Forest and Range Agreement is a business decision, it is also a difficult decision for a First Nation to make since it requires it to essentially waive its right to be consulted and accommodated in return for some economic benefits. In many cases, the First Nation will be in desperate need of the monies and economic opportunities available by signing a Forest and Range Agreement. On the other hand, if it doesn't sign an agreement, forestry activities will likely be undertaken in its traditional territory

in any event, but it may not have the financial means to commence a legal challenge to stop such activities.

It is still too soon after the Supreme Court of Canada's decisions in *Haida Nation* and *Taku River Tlingit* to know whether the Province will show more flexibility in what it is prepared to negotiate in a Forest and Range Agreement, recognizing that it is now clear that a duty to consult and accommodate exists even before a First Nation proves its aboriginal rights or title. Similarly, it remains to be seen whether fewer First Nations will be prepared to give up their consultation and accommodation rights in such agreements in light of the strengthening of their position resulting from the Supreme Court of Canada's decisions.

What *is* clear is that there is much still to be resolved in British Columbia in relation to the nature and scope of consultation and accommodation. It is likely that the courts will be required to provide continuing guidance, on a case-by-case basis, as issues arise in particular circumstances. Although some of the issues have been clarified by the Supreme Court of Canada's decisions, the disputes are far from over.