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Aboriginal Caselaw Summary

Ahousaht First Nation v. Canada (Fisheries and Oceans)

The Federal Court of Canada recently released its decision in *Ahousaht First Nation v. Canada (Fisheries and Oceans)*[1]. The case considered an application by 14 First Nations represented by the Nuu-chah-nulth Tribal Council ("NTC") for judicial review of a decision of the Minister of Fisheries and Oceans regarding the implementation of a commercial groundfish pilot plan on the British Columbia coast (the "Pilot Plan"). The NTC challenged the Minister's decision on the grounds that the Minister failed to fulfil his duty to consult and accommodate the NTC before implementing the Pilot Plan. After reviewing the process leading up to the Plan's introduction, the Federal Court dismissed the application, finding that, although the consultation was not perfect, the flaws did not warrant over turning the Minister's decision.

The decision is significant in that it emphasises the reciprocal duty of First Nations in the consultation process, clarifies the nature of that duty and provides commentary on what comprises adequate and appropriate consultation. In particular, the decision confirms that consultation with Tribal Councils or similar groups, as opposed to individual First Nations can be an acceptable method of consultation

Brief Background

In developing the Pilot Plan, the Department of Fisheries and Oceans (DFO) proceeded through a series of increasingly focused processes designed to gather input from a range of potential stakeholders. Early in the process an integrated advisory committee was struck. An NTC member participated as the designated representative of the Aboriginal Fisheries Commission. In proceeding to the next level of decision making, stakeholder consultation was formally initiated. DFO distributed information to those deemed to be potentially affected by the Pilot Plan including all British Columbia coastal First Nations. Community meetings were held and certain First Nations were engaged in bilateral discussions with DFO. DFO did not include the NTC in these bilateral discussions as DFO did not consider their asserted aboriginal rights to be adversely impacted by the Pilot Plan. That said, when the NTC expressed their desire to enter into bilateral discussion, DFO

[1] 2007 FC 567.

accommodated the request and arranged for meetings to be held. After the first two meetings between NTC and DFO, NTC insisted on diverting discussions from the substance of the Pilot Plan to the particular consultation process they wanted to follow. NTC in fact refused to consider the Pilot Plan until DFO committed to the NTC consultation protocol. Despite the urgency of the situation (DFO needed the Pilot Plan to be in place before the scheduled opening of the fishery); the NTC prolonged the process further by forwarding an extensive and somewhat irrelevant list of questions to DFO. As a consequence of the delays, DFO had to implement the Pilot Plan before all stages of the NTC's desired consultation protocol were completed. As a result the NTC brought an application for judicial review of the decision.

The Decision and Its Implications

The Federal Court considered the scope of the duty to consult and whether or not the steps taken by the Minister were sufficient to meet that duty. The decision makes a number of notable points.

Essential that the aboriginal right be established and the potential impacts upon that right be clearly articulated

The Court referred to the *Haida*[2] decision confirming that in order for the duty to consult to be triggered there must be an established aboriginal or treaty right. Furthermore, it is essential that the right be specifically defined. Once the right is established, the scope and content of the duty to consult may be determined. In this case, the relevant right was the aboriginal right to fish commercially.

The Court reviewed the broad claims of the NTC and considered only those concerns that were directly related to the aboriginal right to fish commercially. Any concerns that failed to demonstrate a potential adverse impact on this right were disregarded. Furthermore, the Court emphasized the need to clearly articulate any anticipated impact the proposed decision would have on the asserted aboriginal right in order to determine the extent of consultation required. In this case, the Pilot Plan was aimed at conservation of the groundfish fisheries, for the benefit of all Canadians, including NTC. DFO had concluded that the aboriginal right to fish commercially, in the context of a plan designed to preserve a commercial fishery, would not be negatively affected. The Court pointed out that, in attempting to refute this position, NTC did not articulate what, if any, potential impacts the Pilot Plan would have on their asserted aboriginal right.

While the definition of rights and articulation of impacts is not a novel concept, the *Ahousaht* decision emphasises that First Nations cannot assert vague and undefined aboriginal rights and demand consultation without providing more specific information on the rights at issue and the impact the contemplated decision might have on those rights..

[2] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511.

Where impacts are limited, the scope of the duty to consult is on the lower end of the spectrum

The Court found that any infringements or adverse effects on the rights of NTC resulting from the Pilot Plan would be limited, especially given the compelling and substantial objective of conservation of the fishery resource. The Court concluded that the duty to consult and accommodate the interests of NTC would be located on the lower end of the spectrum. From there the Court considered what sufficient consultation at the lower end of the spectrum might entail. Several significant points were made:

Timely Consultation

While acknowledging that consultation must be timely to be meaningful, the Court suggested that it may not always be necessary to involve a First Nation directly in the earliest stages of decision making. Rather, indirect notification of the contemplated decision may be sufficient to meet the obligation to provide early consultation. The Court held that NTC could not argue that there was no consultation at the beginning of the process when they were well aware of the development of the Pilot Plan through the designated NTC representative to the advisory committee. The Court noted that, had the NTC representative actually been in attendance at the first four advisory committee meetings, NTC would have been aware of the Pilot Plan and engaged in the consultation process a full year earlier. The opportunity to attend the multilateral discussions of the advisory committee, while admittedly indirect, was an opportunity for NTC to be engaged in the process at the earliest stages. The Court did not see the failure of the NTC representative to attend advisory committee meetings as a flaw attributable to DFO's consultation efforts.

The Court's recognition of the potential acceptability of multilateral consultation processes may open the door to more efficient consultation. While direct Crown consultation with individual First Nations may still be needed in cases involving more serious impacts on rights, *Ahousaht* recognises that this may be unworkable or impractical where there are lesser impacts and multiple First Nations involved.

Bilateral vs. Multilateral Consultation

Building on the above point and using *Taku River*[3] as support, the Court found that bilateral consultation is not necessarily the only acceptable form of consultation. The Court did not see NTC's insistence on bilateral consultation as reasonable given that the duty to consult was on the lower end of the spectrum. Mr. Justice Blais stated:

[3] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* [2004] 3 S.C.R. 550.

> "(w)hile the failure to complete the bilateral consultations may appear, at first glance, to be a violation of the Minister's duty to consult, I believe that there are sufficient extenuating circumstances in this case, including the multilateral consultations that were held, the nature of the plan in question, the accommodations made by the respondent, and the behaviour of the applicants, that militate against a declaration that the Minister breached his constitutional obligations towards (NTC)."

The duty to consult was on the lower end of the spectrum and given that NTC was represented in the multilateral process through the advisory committee and was well aware of the Pilot Plan as it developed, there was no need for the Minister to take further steps to engage NTC.

Along the same line of reasoning the May 3rd, 2007 decision of the British Columbia Court of Appeal in *R. v. Douglas et al*[4] is notable. Without going into detail on the facts of the case, this decision focussed on a similar fishery issue where DFO was imposing regulations to conserve a salmon fishery. A potentially affected First Nation claimed, in part, that joint or multilateral consultations were insufficient to discharge the duty to consult and that separate consultation with the First Nation was required. The Court disagreed, and found that adequate consultation had taken place given the nature of the fishery, the number of First Nations involved and lack of unanimity between them. Joint consultation was seen as reasonable and appropriate, as DFO had provided the First Nation with the necessary information, technical assistance and opportunities to express their concerns.

The takeaway from these cases is that where the duty to consult would appear to be on the lower end of the spectrum, for example where a First Nation has claimed an area as its traditional territory but cannot demonstrate current, active use of the area by its members, multilateral consultation is potentially appropriate to the situation.

Reciprocal Duty of the First Nation

In *Ahousaht,* the Court found that the First Nation's demands to negotiate a consultation protocol frustrated and delayed effective consultation on the substantive issues, making meaningful consultation impossible in the time available. The Court said NTC "squandered" opportunities to provide their input by insisting that DFO abide by a particular consultation protocol instead of engaging in meaningful discussions on the substance of the issues.

These comments are consistent with other recent court decisions. In the *Douglas* case, one of the key points made in the decision was if the First Nation failed to meet, consult or even respond to the major issues, it would be illogical to find that the Crown had failed to consult. The facts showed that the First Nation clearly did not fulfil its reciprocal duty to carry out its end of the consultation to the extent that its members deliberately frustrated all attempts to consult. By failing to meet its own

[4] 2007 BCCA 265.

obligations, the First Nation was precluded from receiving any remedy respecting an infringement on Aboriginal rights.

These decisions reinforce the principal of reciprocity in consultation and the need for the good faith participation of both sides in the consultation process. First Nations do not have the right to insist that their preferred consultation protocol be followed. So long as the First Nation has been presented with reasonable and appropriate opportunities for meaningful consultation, the First Nation has the obligation to participate in the consultation. If the First Nation does not, it will not be able to complain about inadequate consultation.

Summary

The Courts are becoming increasingly critical of complaints from First Nations that obstruct consultation efforts by attempting to impose unilateral procedural requirements. First Nations have a duty to participate in consultation in good faith, to stick to the relevant issues that pertain directly to their aboriginal and treaty rights and to consult specifically on those issues.

The *Ahousaht* and *Douglas* decisions help to clarify reasonable expectations in the consultation process. This will help governments, project proponents and First Nations, and should assist in the development of increasingly appropriate and effective consultation protocols. Judicial consideration of the consultation efforts in both these cases suggests that it is entirely appropriate to design consultation protocols that are dynamic and tailored to meet the specific circumstances instead of relying on rigid and predetermined formulas. By adopting a flexible approach to consultation, project proponents may implement project-appropriate consultation that is capable of being adapted and adjusted in response to information as it is gathered from First Nations.

For more information on these decisions or other aboriginal consultation matters please contact any of the following members of Lawson Lundell's Aboriginal Law group:

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