Local Governments and First Nations Consultation

Fulton & Company

AUTHORED BY:

Len S. Marchand

September, 2003

FULTON & COMPANY
LAWYERS & TRADEMARK AGENTS

LOCAL GOVERNMENTS AND FIRST NATIONS CONSULTATION

A. Introduction

Section 35(1) of the *Constitution Act, 1982*, provides that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Under s. 35(1), unextinguished aboriginal rights, including aboriginal title, existing as of 1982 are constitutionally protected.

Court decisions following the adoption of s. 35(1) into our Constitution have defined the nature of the relationship between First Nations and the Crown, aboriginal rights and aboriginal title. As a result of these decisions, it is clear that the federal and provincial Crowns can infringe aboriginal rights and/or title only where there is a compelling and substantial legislative objective which is implemented in an honourable way. In determining whether an infringement is "justified" the courts will consider the adequacy of consultation with the affected First Nation, and any efforts made to accommodate aboriginal interests.

While there have been many court decisions dealing with these areas, great uncertainties remain, including the scope of who owes duties of consultation. This paper will examine whether a duty on the part of local governments to consult with First Nations arises out of:

1. general administrative law principles;

2. specific provisions of the *Local Government Act*;

3. local governments acting as agents of the provincial Crown; and/or

4. other circumstances.

Before dealing with these four possible sources of a duty on the part of local governments to consult with First Nations, this paper will first deal with:

1. fiduciary duties owed by the federal and provincial governments to First Nations;

2. the definition of aboriginal rights and aboriginal title;

3. infringement of aboriginal rights and/or aboriginal title;

4. when consultation is required;

5. accommodation of aboriginal interests; and

6. the consequences of an unjustified infringement of aboriginal rights and/or aboriginal title.

B. Fiduciary Duties

In *Guerin* v. *Canada*[1], the Musqueam First Nation alleged that Canada had breached certain trust obligations regarding the leasing of reserve land to the Shaughnessy Golf Club. The terms and conditions of the lease negotiated by Canada were not as favourable as the terms and conditions approved by the Band membership. The Supreme Court of Canada held that Canada owed fiduciary duties to the Musqueam, which Canada had breached. Canada was ordered to make good the losses suffered as a result of the breach of its fiduciary duty.

Since *Guerin*, subsequent cases have held that the provincial Crown also owes fiduciary duties to aboriginal people.[2]

Our Court of Appeal has recently explained the nature of the fiduciary duty as follows:

> The fiduciary duty of the Crown, federal or provincial, is a duty to behave towards the Indian people with utmost good faith and to put the interests of the Indian people under the protection of the Crown so that, in cases of conflicting rights, the interests of the Indian people, to whom the fiduciary duty is owed, must not be subordinated by the Crown to competing interests of other persons to whom the Crown owes no fiduciary duty.[3]

Accordingly, both levels of government must treat aboriginal people honourably and with the utmost good faith. These fiduciary duties are owed in many contexts, including during consultation and treaty negotiations.

C. What is an Aboriginal Right?

In *R.* v. *Van der Peet*,[4] a member of the Sto:lo First Nation was charged with selling salmon contrary to certain regulations. Mrs. Van der Peet argued that the regulations did not apply to her as they infringed her aboriginal rights.

In its decision, the Supreme Court of Canada defined an aboriginal right as a practice, custom or tradition which was integral to a distinctive aboriginal culture at the time of first contact between the aboriginal people and Europeans. To be integral, the practice, custom or tradition must have been of central significance to the aboriginal society.

---

[1] *Guerin* v. *Canada*, [1984] 2 S.C.R. 335

[2] *Halfway River First Nation* v. *British Columbia (Minister of Forests)* (1999), 178 D.L.R. (4th) 666 (B.C.C.A.)

[3] *Haida Nation* v. *British Columbia (Minister of Forests)*, 2002 BCCA 147, add'l reasons at 2002 BCCA 462 per Lambert J.A.

[4] *R.* v. *Van der Peet*, [1996] 2. S.C.R. 507

On the evidence lead in the case, the Supreme Court of Canada concluded that trade in salmon amongst the Sto:lo people was incidental, not integral, to the distinctive culture of the Sto:lo First Nation. Accordingly, Mrs. Van der Peet did not have an aboriginal right to sell salmon. She was convicted of an offence under the regulations.

Also of importance in *Van der Peet*, the Supreme Court of Canada held that aboriginal rights must be defined on a case-by-case basis. The fact that Mrs. Van der Peet was unable to establish an aboriginal right to sell salmon in her case does not mean that other First Nations do not have commercial aboriginal fishing rights. In fact, in a companion case called *R.* v. *Gladstone*,[5] the Heiltsuk First Nation established such a right with respect to the trade of herring roe on kelp.

As aboriginal rights must be determined on a case-by-case basis, it is impossible to attempt to "list" such rights in any meaningful way. The types of claims of aboriginal rights which have come before the courts include hunting, fishing and self-government rights. The latter may include, amongst other things, the right for First Nations communities to make cultural, educational, land use and business regulation decisions and the right to a political structure for making these decisions.[6]

Though aboriginal rights are communal, they may be exercised today by the descendants of the people who originally held them. The Supreme Court of Canada has explained:

> They are not personal rights in the sense that they exist independently of the community, but are personal in the sense that a violation of the communal rights affect the individual members' enjoyment of those rights.[7]

D. What is Aboriginal Title?

In *Delgamuukw* v. *British Columbia*,[8] the hereditary chiefs of the Gitksan and Wet'suwet'en First Nations claimed ownership of and jurisdiction over an area of over 58,000 km^2 in central British Columbia. By the time the case reached the Supreme Court of Canada, the claims had been varied to claims of aboriginal title and self-government. As a result of the change in the nature of the claims, the Supreme Court of Canada could not decide the case on the merits, and instead returned the case to the trial court with guidance on the nature of aboriginal title, how to prove it, infringement, consultation and accommodation.

In its decision, the Supreme Court of Canada held the following regarding the nature of aboriginal title:

[5] *R.* v. *Gladstone*, [1996] 2 S.C.R. 723
[6] *Campbell* v. *British Columbia (Attorney General)* (2000), 79 B.C.L.R. (3d) 122 (S.C.)
[7] *Oregon Jack Creek Indian Band* v. *Canadian National Railway*, [1989] 2 S.C.R. 1069
[8] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010

1. Aboriginal title is a unique interest in land arising from the occupation of Canada by First Nations prior to the assertion of British sovereignty (which occurred in British Columbia in 1846 with the signing of the Treaty of Oregon);

2. Aboriginal title is held communally and not by individual members of the First Nation;

3. Aboriginal title includes the right to exclusive use and occupation of the land; and

4. Aboriginal title has an inherent economic component. First Nations are not restricted to using aboriginal title lands in traditional ways. The lands may be used to meet present day needs though not for uses inconsistent with the First Nation's historic attachment to the land.

E. Are Aboriginal Rights and Title Absolute?

As mentioned at the outset, under s. 35(1) of the *Constitution Act, 1982*, unextinguished aboriginal rights and title existing as of 1982 are now constitutionally protected. That does not mean, however, that aboriginal rights and title are absolute. Like other constitutionally protected rights, there are limits.

In *R.* v. *Sparrow*[9], a member of the Musqueam First Nation was charged with fishing with a drift net longer than permitted under the applicable regulations. Mr. Sparrow argued that the regulation infringed his aboriginal rights. In its decision, the Supreme Court of Canada set out an analytical framework for examining infringements of aboriginal rights.

Specifically, the Supreme Court of Canada held that provincial (or federal) legislation infringes an aboriginal right where unreasonable limitations are imposed, undue hardship results or there is a denial of a preferred means of exercising the right. An infringement may, however, be "justified" where there is a compelling and substantial legislative objective which is implemented in an honourable way.

In analyzing whether an infringement is justified, the Supreme Court of Canada held that the courts must consider:

1. the allocation of priorities;

2. whether there is as little infringement as possible;

3. whether fair compensation is available;

[9] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075

4. the adequacy of consultation; and

5. efforts made to accommodate aboriginal interests.

Our Court of Appeal has augmented the factors set out above to include a consideration of:

1. whether the infringement is consistent with the fiduciary duty owed to the holders of the aboriginal right or title; and

2. the extent to which the economic interests of the First Nation and the public at large are affected by the objective of the infringement.[10]

The *Sparrow*[11], *Gladstone*[12] and *Delgamuukw*[13] decisions have identified some types of legislative objectives which may justify an infringement of aboriginal rights or title. These include:

1. conservation of scarce resources;

2. development of agriculture, forestry, mining and hydroelectric power;

3. general economic regional development;

4. protection of the environment or endangered species;

5. building infrastructure; and

6. settlement of populations to support these objectives.

F. When Is Consultation Required?

In *Haida Nation* v. *British Columbia*[14], the Haida sought a declaration that British Columbia had a legally enforceable duty to the Haida to consult with them in good faith and to seek a workable accommodation of their interests before transferring a Tree Farm License from MacMillan Bloedel to Weyerhaeuser. The Tree Farm License covered lands claimed to be within the traditional territory of the Haida.

[10] *Haida Nation* v. *British Columbia (Minister of Forests)*, 2002 BCCA 147, add'l reasons at 2002 BCCA 462 per Lambert, J.A.
[11] *Supra*, note 9
[12] *Supra*, note 5
[13] *Supra*, note 8
[14] *Supra*, note 3

Given the stage of the proceedings, the Haida had not established the existence of aboriginal title in the area. Nevertheless, the British Columbia Court of Appeal held that the Haida had very strong claims of aboriginal title and of aboriginal rights to utilize cedar from old growth forests, and that both British Columbia and Weyerhaeuser had a duty to consult before potentially infringing the Haida's claims. In other words, the Court held that the duty to consult arises in the face of *asserted* aboriginal rights or title, not just *proven* aboriginal rights or title. The Court also held that where an aboriginal right or title is unproven (before the courts), the depth of the duty to consult is proportional to the strength of the evidence supporting the claim.

Regarding the depth of consultation required in the circumstances, in *Delgamuukw*[15], the Supreme Court of Canada had previously held:

> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

G. How Can Aboriginal Interests be Accommodated?

The short answer to the question posed by this heading is, "it depends". As with other aspects of aboriginal rights and title, whether aboriginal interests have been accommodated must be determined on a case-by-case basis. Both the decision making process and the actual result of that process will be considered.

In *Delgamuukw*[16], the Supreme Court of Canada explained:

> The exclusive nature of aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown's fiduciary duty requires that aboriginal title be given priority … (w)hat is required is that the government demonstrate … "both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest" of the holders of aboriginal title in the land. … (T)his might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licenses for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced. This list is illustrative and not exhaustive.

[15] *Supra*, note 8

[16] *Supra*, note 8

H. What are the Consequences of an Infringement of an Aboriginal Right or Title?

A number of court decisions have made clear that, where an infringement is unjustified, the court can strike down the legislation or otherwise stop the offending conduct. For instance, in *MacMillan Bloedel* v. *Mullin*[17], our Court of Appeal granted an injunction against MacMillan Bloedel which prevented it from logging Meares Island. Other examples include the construction of highways being halted.[18] Where the offending conduct has already gone ahead, compensation may be payable.

Delgamuukw[19] and other court decisions also make clear that even where an infringement is justified, compensation may still be payable.

I. Do Local Governments Owe a Duty to Consult?

Until recently, the common thinking was that only the federal and provincial Crowns, and their agencies, owed duties of consultation to First Nations. This thinking was recently shattered by our Court of Appeal in the *Haida*[20] decision.

As set out above, in *Haida*, our Court of Appeal imposed, for the first time in Canadian history, a duty of consultation on a private company, Weyerhaeuser. Mr. Justice Lambert identified three sources for Weyerhaeuser's duty to consult, as follows:

1. From the provisions of the *Forest Act* and Tree Farm License under which Weyerhaeuser obtained its license to harvest. These provisions included an express condition that Weyerhaeuser consult with the Haida;

2. As a "constructive trustee". Weyerhaeuser received the Tree Farm License when it knew or should have known that the Crown's transfer of the license was in breach of the Crown's fiduciary duty to consult the Haida. This "knowing receipt" created a duty in Weyerhaeuser to consult; and

3. From Weyerhaeuser's opportunity to raise "justification" in defence to the Haida's claim that the transfer of the Tree Farm License violated the Haida's aboriginal rights and/or title. If Weyerhaeuser wished to benefit from the justification defence, it also had to bear the burden of consultation.

[17] *MacMillan Bloedel* v. *Mullin* (1985), 61 B.C.L.R. 145 (C.A.)
[18] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, 2001 FCT 1426 and *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)* (2002), 98 B.C.L.R. (3d) 16 (C.A.)
[19] *Supra*, note 8
[20] *Supra*, note 3

Chief Justice Finch restricted the source of Weyerhaeuser's duty to consult to the unique circumstances of the case. In his opinion, Weyerhaeuser's duty to consult arose because Weyerhaeuser received the Tree Farm License when it "suffered a legal defect" (the claim of aboriginal title) which could not be remedied without its participation.

Mr. Justice Lowe dissented and would not have imposed any duty of consultation on Weyerhaeuser. The case has been granted leave to appeal to the Supreme Court of Canada.[21]

The *Haida* case throws open the question of how far beyond the federal and provincial Crowns the duty to consult extends. In the municipal context, I am aware of only two cases to date across Canada dealing with issues of First Nations consultation.

In *TransCanada Pipeline Ltd.* v. *Beardmore Township*[22], a municipal restructuring commission ordered the amalgamation of two towns and two townships and the annexation of unorganized territory into the restructured municipality. The commissions' empowering legislation provided that "the commission shall consult with each municipality in the prescribed locality… and *may* consult with such other persons and bodies as the commission considers appropriate". [Emphasis added]. Two First Nations organizations challenged the commission's order on the basis that the order would infringe their aboriginal rights and title.

The Ontario Court of Appeal considered the duty to consult both from an administrative law perspective and an aboriginal rights perspective. From the administrative law perspective, the Court held that the commission had not lost its jurisdiction by failing to consult with the First Nations organizations. The enabling legislation *allowed* but did not *require* consultation with First Nations. From the aboriginal rights perspective, the Court held that the evidence did not establish that any existing aboriginal or treaty rights would be infringed. Accordingly, the challenge of the First Nations organizations was dismissed.

In *Sturgeon Lake Cree Nation* v. *Greenview (Municipal District No. 16)*[23], the Sturgeon Lake Cree Nation ("SLCN") appealed a decision of the Subdivision and Development Appeal Board of the Municipal District of Greenview which authorized the construction of an R.V. Park on private lands. The SLCN argued that the Board failed to consider whether there had been adequate consultation with them regarding their aboriginal rights by the planning authorities. The Alberta Court of Appeal rejected the appeal of the SLCN on the basis that the Board was a statutorily created administrative body that did not have the statutory authority to consider constitutional issues. The court did not consider the *Haida* decision.

[21] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2002] S.C.C.A. No. 417
[22] *TransCanada Pipeline Ltd.* v. *Beardmore Township* (2000), 186 D.L.R. (4th) 403 (Ont. C.A.)
[23] *Sturgeon Lake Cree Nation* v. *Greenview (Municipal District No. 16)*, [2003] A.J. No. 502 (C.A.)

In British Columbia, the starting point in considering whether local governments owe duties of consultation to First Nations is the *Local Government Act*[24]. The *Local Government Act* confers broad ranging legislative powers on local governments, some of which may have an impact on the exercise or enjoyment of aboriginal rights or title. Without intending to be exhaustive, these include legislative powers over land use planning (including regional growth strategies), infrastructure (including highways), business regulation, regulation of animals and protection of trees.

Against this backdrop, I will consider the following potential sources of a duty on the part of a local government to consult with First Nations:

1. general administrative law principles;

2. specific provisions in the *Local Government Act*;

3. local governments acting as agents of the provincial Crown; and

4. other circumstances.

Administrative Law Principles

In the *Local Government Act*, there are many examples of legislative powers which may only be exercised after a local government provides an opportunity for public input. For instance, under sections 882 and 883, local governments must hold a public hearing prior to adopting an Official Community Plan. The public hearing must be conducted in accord with the requirements of the *Local Government Act* and general administrative law principles. Essentially, interested or affected parties must be given adequate notice of the public hearing and an opportunity to be heard.

While not truly "consultation" as described above, receiving the input of potentially affected First Nations at a public hearing is consistent with general administrative law principles. Based on the *TransCanada Pipeline Ltd.* and *Sturgeon Lake Cree Nation* cases out of Ontario and Alberta, the principles of administrative law do not appear to create a deeper duty of consultation and accommodation. Given the *Haida* decision, however, more may be required in British Columbia.

[24] *Local Government Act*, R.S.B.C. 1996, c. 323

Specific Provisions in the Local Government Act

Part 25 of the *Local Government Act* empowers regional districts to adopt a regional growth strategy to, amongst other things:

- avoid urban sprawl;
- make effective use of transportation and utility corridors;
- protect environmentally sensitive areas;
- maintain the integrity of a secure and productive resource base, including agriculture and forest land reserves;
- promote economic development;
- reduce and prevent air, land and water pollution;
- provide adequate inventories of land and resources for future settlement;
- protect the quantity and quality of ground and surface water; and
- provide good stewardship of land, sites and structures of cultural heritage value.

Section 885(1) of the *Local Government Act* requires that a Board proposing a regional growth strategy must provide an opportunity for consultation with persons, organizations and authorities who the Board considers will be affected by the strategy. Given how the content of a regional growth strategy may well impact aboriginal rights or title, it is not surprising that s. 885(2) of the *Local Government Act* also requires that the Board adopt a plan for consultation not only with citizens, affected local governments, various agencies and the provincial and federal governments, but also with First Nations. Under s. 885(3) a failure to comply with a consultation plan does not invalidate the regional growth strategy "*as long as reasonable consultation has taken place*." [Emphasis added]. To look at it from a different perspective, a regional growth strategy may be invalid if there has not been reasonable consultation.

Part 25 of the *Act* provides a mechanism to secure the agreement of member municipalities with a regional growth strategy. There is no similar provision to secure the agreement of First Nations. However, given the *Haida* decision, the statutory duty of First Nations consultation created by s. 885 of the *Local Government Act* likely includes a duty to accommodate First Nations' interests and, perhaps, to pay compensation for any infringements of aboriginal rights or title.

A plain reading of the provincial Consultation Policy makes clear that it is not intended to apply to local governments. However, given the finding in *Haida* that a private corporation can owe a duty of consultation and accommodation to an affected First Nation, it would be incongruous if local governments, acting as an agent of the Province regarding, for instance, land use planning, did not also owe a duty of consultation and accommodation.

The character of local governments in British Columbia as agents of the Province for, amongst other things, land use planning, may well be sufficient to found a duty of consultation and accommodation.

Other Circumstances

In the *Haida* case, our Court of Appeal has held that, in appropriate circumstances, parties other than the federal and provincial Crown may owe duties of consultation and accommodation. Whether any particular circumstances give rise to these duties will have to be determined on a case-by-case basis. Though no such circumstances have come before the courts to date, local governments must be aware that such circumstances could arise for them in the future.

J. The Implications for Local Governments

The legal principles concerning aboriginal rights and title, duties of consultation and accommodation and who owes such duties is currently in a state of flux and uncertainty. The object of this paper has been to provide general information on these issues and to identify a number of potential sources of a duty to consult and accommodate First Nations on the part of local governments.

In my view, it is only a matter of time before issues involving local governments' duties of consultation and accommodation come before the courts. In the meantime, as a matter of good practice, good planning and good sense, local governments would be wise to engage potentially affected First Nations and to accommodate their interests when exercising legislative powers in the *Local Government Act* which require public input or First Nations consultation as part of a decision making process.

While it is beyond the scope of this paper to propose a specific protocol for consultations with First Nations, I am attaching a copy of the October 2002 Provincial Policy. When considering whether and how to consult with First Nations, local governments would be well advised to first obtain legal advice.