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# THE BRITISH COLUMBIA SUPREME COURT CONFIRMS THAT MUNICIPALITIES HAVE NO DUTY TO CONSULT AND ACCOMMODATE ABORIGINAL PEOPLES

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ON APRIL 4, 2012, THE BRITISH COLUMBIA SUPREME COURT RENDERED ITS DECISION IN THE CASE *NESKONLITH INDIAN BAND* V. *SALMON ARM (CITY)*[1] AND THEREIN CONFIRMED THAT MUNICIPALITIES HAVE NO DUTY TO CONSULT AND ACCOMMODATE ABORIGINAL PEOPLES.

The Court based its decision on the Supreme Court judgments in *Haida*[2] and *Rio Tinto*[3] as well as decisions of the British Columbia courts and established three main principles. First, the honour of the Crown, which is the source of the duty to consult, cannot be delegated to third parties. Second, the provinces may delegate procedural aspects of the duty, but the Court reiterates that this must be done via an express or implied statutory delegation. Finally, municipalities have no independent constitutional duty to consult Aboriginal peoples. It is the provinces that are ultimately responsible for fulfilling the duty to consult and accommodate and Aboriginal peoples retain a remedy against them when the duty is not met.

[1] 2012 BCSC 499 (CanLII).

[2] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73.

[3] *Rio Tinto Alcan Inc.* v. *Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650.

## FACTS

The Neskonlith First Nation ("Neskonlith") is part of the Secwepemc (Shuswap) Nation, whose traditional territory spans over 180,000 square kilometers in the south central interior of British Columbia, including the Salmon River delta and floodplain. Neskonlith continues to assert its Aboriginal title over this territory.

Salmon Arm Shopping Centers Limited (the "proponent") wanted to build a shopping centre on private land located on the Salmon Arm delta and floodplains. Because the area was designated as an environmentally hazardous area, the City of Salmon Arm's *Official Community Plan* required that the company obtain a "hazardous area development permit". Neskonlith's reserve borders on and is situated downstream from the proposed development.

Neskonlith wrote to the city on several occasions in order to express its concerns regarding the project, in particular the flooding risk and the lack of consultation. Neskonlith also had the occasion to make representations to the city and attended public hearings regarding the project. According to the evidence, the city corresponded with Neskonlith "to some degree" but the latter alleges that its concerns were not adequately addressed. Neskonlith filed a petition seeking to quash the permit and seeking a declaration that the City owed a constitutional and legal duty to consult with the First Nation before issuing the permit.

Neskonlith tendered evidence that the Secwepemc Nation occupied and exercised exclusive control over the area at the time of assertion of sovereignty and that the Nation continues to assert Aboriginal title to the area. Furthermore, Neskonlith argued that the delta and floodplain is the site of important current and traditional activities and is the last unregulated river delta in the Shuswap lake watershed. Neskonlith also tendered expert evidence showing that the presence of many culturally important plants makes the area vital to the cultural and knowledge practices of the Secwepemc people. Neskonlith's expert report also demonstrated that flooding and adverse effects for neighboring areas were a substantial risk of the project.

Neskonlith argued that the duty to consult and accommodate Aboriginal peoples that applies to provinces under section 35 of the *Constitution Act, 1982* should apply to municipalities in their dealings with Aboriginal peoples. Given that municipalities are local governments that exercise delegated provincial authority, Neskonlith submitted, they must be distinguished from other third parties such as those that were at issue in *Haida* and *Rio Tinto*. Therefore, when a province delegates the authority to make decisions to a municipality, which may have adverse effects on claimed or proven Aboriginal rights, that authority must be exercised in a manner that is compatible with the honour of the Crown. In order to support this position, Neskonlith relied on an analogy with the Supreme Court of Canada jurisprudence that establishes that the *Canadian Charter of Rights and Freedoms*[4] applies to municipalities because they are entities upon whom the provinces delegate governmental powers that are within their authority. The duty to consult, submitted Neskonlith, must attach to the actual decision maker, in this case the municipality. The latter must, as actors exercising governmental functions, be subject to the duty to consult and accommodate in the same way that they are subject to the *Charter*.

The respondents argued that *Haida* and *Rio Tinto* clearly establish that the duty to consult and accommodate cannot be delegated to third parties. The proponent also argued, in the alternative, that there were no adverse effects on Neskonlith's Aboriginal rights or, in the further alternative, that if a duty to consult and accommodate did arise in this case, it was met by the city.

## THE COURT'S DECISION

The principal question before the Court was whether the municipality owed a duty to consult and accommodate Aboriginal peoples. The Court reviewed the Supreme Court's decisions in *Haida* and *Rio Tinto* and reaffirmed that these decisions stand for the principle that the honour of the Crown, which is the source of the duty to consult and accommodate, cannot be delegated to third parties. Furthermore, the Court determined that the analysis in *Rio Tinto* regarding administrative tribunals applies equally to municipalities. The Court also considered decisions from the British Columbia courts that dealt with the question to varying degrees and found no support for the proposition that municipalities owe a duty to consult and accommodate Aboriginal peoples.

[4] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (hereinafter "*Charter*").

The Court concluded that three principles are established by these decisions: First, the honour of the Crown, which is the source of the duty to consult and accommodate, cannot be delegated to third parties. Furthermore, provinces may delegate procedural aspects of the duty to municipalities but this must be done via an express or implied statutory authority. Lastly, municipalities owe no independent duty to consult. It is the provinces who are ultimately responsible for ensuring that adequate consultation occurs and Aboriginal peoples retain a remedy against the provincial Crown when the obligation is not met. The Court rejected Neskonlith's position that the obligation to consult vests with those governmental entities empowered to make decisions that can adversely affect Aboriginal rights. Furthermore, it did not find Neskonlith's analogy to the case law on the *Charter* to be convincing. The Court held that since the *Charter* exists to protect individuals from government action whereas section 35 of the *Constitution Act, 1982*, source of the duty to consult, is intended to protect existing Aboriginal and treaty rights, there can be no parallel interpretation of the two.

On April 23, 2012, the Neskonlith First Nation filed a Notice of Appeal with the British Columbia Court of Appeal.

## DISCUSSION

This decision is very important for municipalities because it confirms in unequivocal terms that they owe no duty to consult and accommodate Aboriginal peoples. At most, they can be delegated certain procedural aspects via an express or implied statutory delegation by the provinces, but the latter are ultimately responsible for ensuring that the duty is met. Any doubt concerning the role of municipalities and any speculation regarding, for example, the possibility of making an analogy with *Charter* case law are hereby dispelled. Another result of this decision, however, is to create a disjunction between the locus of decision-making and the locus of constitutional responsibility, which poses a real challenge for fulfilling the duty as well as possibly compromising the right itself. At least, this is the case until the appeal is decided.

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