Fraser Valley Regional District

CORPORATE REPORT

To: Fraser Valley Aboriginal Relations Committee
Date: 2019-04-11

From: Jessica Morrison, Policy Analyst – Indigenous Relations
File No: 3400-01

Subject: Recent Consultation and Accommodation Case Law Update

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INTENT

This report is intended to advise the Fraser Valley Aboriginal Relations Committee of the highlights of a seminar on Consultation and Accommodation Case Law Updates recently attended by staff. This report is not providing legal advice. Staff are not looking for a recommendation at this time, and forward this information should members want more clarification, or to discuss the item further.

STRATEGIC AREA(S) OF FOCUS

Provide Responsive & Effective Public Services
Foster a Strong & Diverse Economy
Support Healthy & Sustainable Community
Support Environmental Stewardship

BACKGROUND

On February 28 – March 1, 2019, FVRD staff attended a seminar reviewing recent development in consultation and accommodation case law. The event was produced by the Pacific Business and Law Institute (PBLI). These annual PBLI seminars provide important insights into evolving legal frameworks for First Nation consultation and accommodation. Seminar presenters are legal counsel with expert local experience, and in some cases, direct involvement, in the important cases that have been argued. The perspectives provided through the seminar are detailed and nuanced, and invaluable in understanding the current and shifting legal landscape.

Recent cases of interest which were discussed in the seminar included:

Tsleil-Waututh Nation v. Canada, 2018 FCA 153
Challenge to Trans Mountain Pipeline NEB Approval, on the basis that the Crown had not met its duty to consult.

Ahousaht Indian Band and Nation v Canada, 2018 BCSC 633
Challenge to justification for infringement of proven fishing rights by Canada's regulation of the fishing industry.

Mikisew Cree First Nation v. Canada, 2018 SCC 40
Challenge to adverse impacts to treaty rights to hunt, trap and fish, resulting from omnibus legislative changes to the Canadian Environmental Assessment Act (CEAA), Fisheries Act, Species at Risk Act, and the Navigable Waters Protection Act.

Gamlaxyeltxw (Gitanyow Nation) **v British Columbia, 2018 BCSC 440**
Challenge to how the Crown manages conflict between Treaty-established rights and asserted, unproven rights. The Nisga'a Nation has entered into a modern treaty and the Gitanyow Nation has asserted Aboriginal rights. The case arose over differing opinions on the management of a wildlife harvest area.

Eabametoong First Nation v Landore & MNDM, 2018 ONSC 4316
Challenge to the issuance of a permit to conduct exploration drilling, on the basis that the Crown had not met its duty to consult.

Taseko Mines v Canada, 2017 FC 1100
Taskeo Mines challenged the procedural fairness of the Canadian Environmental Assessment Act (CEAA) rejection of their proposed New Prosperity open pit gold-copper mine project, on the basis that they were not provided an opportunity to respond to panel submissions by First Nations.

Some of the key takeaways from these recent cases about how local governments should be thinking about consultation and accommodation include:

Substance matters

- The substance, not just the structure, of consultation matters.
- The days of "tick box" consultation are over.
- Building a legal defense is not a consultation strategy.
- Aiming for the minimum to get over the bar is not 'real intention', as it does not seek to build a relationship.
- Consultation is not for First Nations to "blow off steam" before the government or a proponent carries on with its plans. Consultation is a meaningful two-way dialogue, and meaningful two-way dialogue involves being prepared to amend policy proposals in light of information received, and providing feedback.
- Many problems are easily resolved by proponents just asking basic questions to the First Nations community.

Procedural aspects of the duty to consult are clarified

- The duty to consult trumps the duty of procedural fairness in decision-making.
- Expectations about timeline of outcomes must not be set unilaterally, and may even have to be set aside entirely.
- A negotiating party must send representatives who have the authority to negotiate the terms being discussed. Consultation must be conducted by someone who has the ear of the decision-maker.
- The duty to consult does not apply in the law-making process.

- Where there is conflict between a treaty-protected right and a claimed Aboriginal right, the treaty-established right supersedes.

DISCUSSION

Discussion is presented in two sections. This first section contains commentary by seminar presenters regarding specific recent cases. The second section contains commentary by seminar presenters on the general direction of the law around a range of generally recurring themes in Indigenous consultation law.

Case Reviews

Tsleil-Waututh/Trans Mountain – Substance matters
Commentary provided by
Matthew Kirchner, Ratcliff & Company LLP
Paul Seaman, Gowling
Scott Smith, Gowling
Jennifer Griffith, Donovan & Company
Rosanne Kyle, Mandell Pinder LLP

At issue: Six First Nations, two municipalities, and two environmental organizations challenged the National Energy Board (NEB) approval of the Trans Mountain pipeline expansion.

Finding : The court ruled in favour of the First Nations, on the grounds that Canada had:

- failed to engage, dialogue meaningfully, and grapple with real concerns of Indigenous applicants;
- failed to explore possible accommodations for the concerns of Indigenous applicant; and
- made unreasonable and unjustified exclusion of marine shipping from consideration or discussion during consultation.

Discussion: The court found that the structure of consultation had been sufficient, but the content of discussions was inadequate (i.e. listening and note-taking is not a meaningful two-way dialogue). It found the consultation also "unreasonably excluded" marine shipping from consideration or discussion, without justification. Consultation is not for Indigenous peoples to "blow off steam" before the government goes ahead with whatever it would like to do. Consultation is not to simply "receive the concerns of First Nations". It is meant to be a meaningful, two-way dialogue.

The court looked beyond the massive record of "consultation fluff" and looked at the substance of the engagement. In other words, logging dates and times of phone messages, noting when someone bumped into a Chief over coffee, records of letters mailed, etc., is an empty approach. The volume of interactions is not to be interpreted as substance.

The court noted that the execution of the process was "unacceptably flawed" and "fell well short of the mark". The court criticized the Crown for sending note-takers to conduct the consultation. It clarified that consultation must be conducted by someone who has the ear of the decision-maker (i.e. cabinet, in this case). It is not considered adequate to send a consultant or low-level staff to conduct consultation.

Ahousaht – Procedural aspects of the duty to consult are clarified
Commentary provided by
Matthew Kirchner, Ratcliff & Company LLP

At issue: Five First Nations challenged the justification for infringement of proven (2009) fishing rights by Canada's regulation of the fishing industry.

Finding: The court ruled in favour of the First Nations. A party who comes to a negotiation table with no mandate or ability to negotiate is not negotiating at all, and cannot be said to be acting in good faith, even if the Crown's representatives on the ground are well meaning.

Discussion: The court found that the First Nations had previously established (2009) the right to catch and sell fish, and that those rights had been infringed. The question of whether there was justification for the infringement was deferred, pending discussion between Canada and the First Nations. Those negotiations did occur, but no agreement could be reached between the parties.

The Crown was found to have "stymied" and "stonewalled" attempts to negotiate the framework by which the rights-based fishery would co-exist alongside The Department of Fisheries and Oceans' (DFO's) regulation of the fishery, and thus the Crown did not act honourably.

The court clarified that proper consultation entails testing and being prepared to amend policy proposals in light of information received, and providing feedback. None of that can occur if representatives of a party at the table do not have the ability to substantially address concerns or obtain consent.

This decision is now under appeal.

Mikisew Cree - Procedural aspects of the duty to consult are clarified
Commentary provided by
Matthew Kirchner, Ratcliff & Company LLP
Karey Brooks, JFK Law

At issue: The Mikisew Cree First Nation argued that the duty to consult was triggered when, in 2012, Canada introduced two omnibus bills which affected their protected Aboriginal rights to hunt, trap, and fish.

Finding: The court found in favour of Canada. The development and passing of legislation does not trigger the duty to consult.

Discussion: This challenge pertained to omnibus changes to a number of federal statutes under two omnibus bills introduced between 2006 and 2016:

- Canadian Environmental Assessment Act (CEAA)
- Fisheries Act
- Species at Risk Act
- Navigable Waters Protection Act

The court noted that parliamentary sovereignty must be maintained and not be subject to judicial review. First Nations should instead lobby government or seek to be heard by parliamentary committees, when they feel their protected Aboriginal rights may be infringed.

There are practical concerns with imposing the duty to consult on passing legislation, which would introduce dysfunction to the law-making process. Additionally, passing legislation is not 'Crown conduct' (which is the trigger for the duty to consult). 'Crown conduct' refers only to executive function. However, the duty to consult may be triggered by subordinate legislation. While the duty to consult may not be triggered in the legislative process, the 'honour of the Crown' still underlies processes.

There are two constitutional principles which underlie this discussion; the separation of powers and parliamentary sovereignty. These principles make it inappropriate for courts to scrutinize the law-making process. Extending the duty to consult to the legislative process would oblige the judiciary to exceed its institutional role and upset the balance of powers between the three branches of government.

There were dissenting opinions from the justices on this matter, but the ramifications of finding a duty to consult in respect of drafting and passing legislation are abstract and potentially far-reaching. This may have been a factor in the majority's conclusion.

Gitanyow Nation – Procedural aspects of the duty to consult are clarified
Commentary provided by
Matthew Kirchner, Ratcliff & Company LLP

At issue: This case explores what impact a modern day treaty has on the assertion by Aboriginal peoples, who are not a party to that treaty, of their Aboriginal title and rights over parts of the same land and resources to which the treaty applies. The Gitanyow Nation argued that their Aboriginal right to harvest moose has priority over the Nisga'a moose allocation. They also argued that the Nisga'a allocation of the total allowable harvest should be reduced.

Finding: The court found that it was obligated to honour an established treaty right over an asserted, unestablished right.

Discussion: The Nisga'a Treaty establishes a wildlife harvest area. Each year, the Nisga'a recommend to the Minister a total allowable harvest for moose within that area. The Minister can accept or reject that recommendation. As well, each year the Nisga'a propose to the Minister an annual management plan that will apply to harvesting by Nisga'a members. The Minister must approve an annual management plan if it is consistent with the Treaty.

The court felt that the Minister had a duty to consult the Gitanyow on the annual allowable harvest. Consultation with the Gitanyow would not impact Nisga'a Treaty rights. Consultation on the adequate level of moose population is an issue on which Gitanyow's input could benefit the Minister's decision, and nothing in the Treaty precluded this discussion.

However, the court found there was no duty to consult on the Province's decision on the annual management plan. The annual management plans are implemented, monitored and enforced solely by the Nisga'a and applied only to Nisga'a citizens – they are an element of the Nisga'a's internal governance and are not an issue that can be consulted on between the Crown and the Gitanyow.

Although the Minister had a duty to consult on the total allowable harvest, the court noted that the Gitanyow do not have a right to be accommodated in a way that would interfere with the Treaty. Consultation between the Gitanyow and the Crown cannot result in a modification of the Nisga'a Treaty rights or allotments provided for under the treaty. As such, deep consultation might be precluded by the inability to accommodate.

There is concern that this decision is inconsistent with the principle that Aboriginal rights are pre-exiting and not created by section 35 or a court declaration. The case is under appeal.

Landore - Substance matters, Procedural aspects of the duty to consult are clarified
Commentary provided by
Morgan Camley, Miller Thompson

At Issue: The Eabametoong First Nation challenged the decision to issue of a permit to Landore, a junior mining company, to conduct exploration drilling. The basis of the challenge was that the Crown had not met its duty to consult.

Finding: The court found in favour of the First Nation, that consultation efforts had been insufficient. While the duty to consult was the responsibility of the Crown, it had relied in this case, on the delegated procedural aspects of consultation carried out by the company. The company was found to have failed to engage in a full consultation. The court clarified that consultation is not an afterthought. It is about listening intently, and "real intention of talking together for mutual understanding" must be demonstrated.

Discussion: In this case, three days after requesting engagement on their intention to pursue an exploration permit, the proponent requested that the First Nation sign an MOU with the company. The proponent then sent the First Nation a re-cycled, draft MOU that it had signed with another First Nation.

The company had its first meeting with the First Nation two months later. The First Nation viewed the meeting as the start of a consultation process, and as such, made no comments on the project in the meeting.

Four days later, the company submitted its permit application to the Province, stating that it had conducted consultation, and that no concerns were raised by the First Nation.

A second face-to-face meeting happened between the company and the First Nation six months later. The First Nation expressed anger about the environmental damage done by previous mining activities.

After another six months had passed, the Province notified the First Nation that it intended to make a decision on the permit. The First Nation immediately communicated its concerns to the Province, previously raised to the company.

The Province then drafted a list of conditions under which it would issue the permit. The First Nation was not engaged in the drafting of these terms, and the company did not meet again, or sign an MOU, with the First Nation, citing that "enough time had passed." The First Nation responded to the terms proposed by the Province, explaining why they were insufficient to address their concerns.

This decision demonstrates that it is necessary to look beyond form to substance. While the company and the Crown in this case took procedural steps toward a consultative effort, the substance of consultation was lacking considerably. The desire of the Crown and the proponent to terminate consultation due to the length of time that had passed (2 years total), was not sufficient grounds to move ahead with issuing the permit in the face of unresolved concerns raised by the First Nation.

Taseko - Procedural aspects of the duty to consult are clarified
Commentary provided by
Morgan Camley, Miller Thompson

At Issue: Taseko Mines alleged that there were breaches to procedural fairness in the finding that its proposed open pit gold-copper mine would cause significant adverse environmental impacts.

Finding: The company was owed a duty of procedural fairness in aspects of the process, but it was not owed a high degree of procedural fairness at the Ministerial decision stage.

Discussion: The decision-maker's duty to consult requires balancing meaningful consultation with the principle of fairness to each participant, which produces a tension between competing "good principles."

In this case, the proponent felt it should have been given the opportunity to respond to issues raised by First Nations to the panel during the Crown's consultations. However, a proponent does not have a *right* to take part in the consultations between the Crown and a First Nation. This is not to say that a proponent may never have a *role* in consultations between the Crown and a First Nation.

Presenter Commentary on Generally Common Legal Issues

Notes on Accommodation in Practice
Commentary provided by
Aaron Bruce, Ratcliff & Company LLP

Accommodation is *consultation geared towards reconciliation*, where actions are taken which minimize impacts on Aboriginal interests. These interests must be balanced in a negotiation, and are not suited to templates or "cookie-cutter" approaches. Accommodations are project and context-specific and are therefore not universally applicable.

Sometimes how a community seeks compensation may not seem to make sense to a proponent, but may speak best to the needs to the community (i.e. a wellness centre might meet a community's needs best, rather than project-related jobs set aside).

Direct award or sole source contracts as compensation are usually smaller. Competitive bid processes are becoming more desirable to First Nations because they are thinking on a larger scale. These types of accommodations take some finessing, as First Nations often cannot contribute significant capital to a project to be able to partner in traditional ways.

Establishing cultural use areas or cultural lease areas is easier than transfer of land ownership. There are lots of creative options, such as waiving taxes and fees.

Many opportunities are lost simply because papers get buried on someone's desk, or are just never implemented.

Building Indigenous Capacity for Consultation
Commentary provided by
Raf De Guevara, Westbank First Nation
Erin Hanson, Tsleil-Waututh Nation

The Westbank First Nation demonstrated how it initially used Forest Consultation and Revenue Sharing Agreements (FRCRSA) funding to set up a Title and Rights department, and then establish a referral review process. The referral review process is now using archaeological consulting revenue to fund ongoing referral review through the department.

Westbank says that they are finding it refreshing now that government staff seem to understand the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the 10 principles respecting the Government of Canada's relationship with Indigenous Peoples (see attachment), and title and rights recognition. While Westbank previously found that just one government representative at a meeting or negotiating table might have understood this context and the principles, they are pleased to now find that most representatives coming to the table seem to have a good grasp on the concepts. Westbank feels they can work with knowledgeable staff. They see that massive shift in understanding is taking place and are encouraged. They note that where they do encounter old attitudes, they will respond with old attitudes in return.

Westbank say that they have decided that they will no longer support 30 year terms on any type of lease or permit. Representatives note that local government MOUs are important, but they need to be actually used, not just signed and forgotten about.

The Tsleil-Waututh Stewardship policy was developed to address interests through a defined process with timelines, standard information requirements, and a fee schedule for proponents to help cover the basic administrative costs of reviewing and responding to referrals.

The Haida (2004) decision that said First Nations have an obligation to come to the table in the consultation process, but no court has clarified how that involvement was supposed to be funded. In the absence of an answer, First Nation organizations have had to design creative solutions.

Regardless, Tsleil-Waututh say it is still not possible for them to respond to every request that they receive, as they receive approximately 400 annually.

Tsleil-Waututh notes that they see huge opportunities to work more closely with municipalities going forward.

Justifiable Infringement Claims
Commentary provided by
Bruce McIvor, First Peoples Law

We are at the end of the era of consultation and accommodation, moving toward a rights recognition framework. The duty to consult frustrates everyone. The process typically devolves into notes taking, record keeping, and rarely gets to the heart of a matter, or resolve issues. Consultation means nothing if you can't accommodate. Therefore, sending note-takers to conduct consultation is clearly a frustration of the process.

Consultation is a procedural right, not a substantive right. It doesn't have to be perfect. Claiming there is not a trigger for consultation is no longer a reasonable defense on which to rely.

Many parties think that they want clarity on the process, but the outcome is typically unpalatable. This is because that clarity results is a procedural roadmap to do more consultation. If you simply do it meaningfully the first time, you won't need to seek clarity.

The presenter cautioned that Consultation is a serious constitutional obligation. If you don't do it right, authorizations should be quashed without a "do-over". The Crown and proponent should not be able to undershoot the minimum, and then wait to see if a First Nation can afford to litigate. The way consultation is approached now (as in the Trans Mountain pipeline expansion), if you are challenged and lose, you are permitted to conduct more consultation until you nudge over the bar that is considered the minimum standard. The courts are showing that consultation is a constitutional obligation that must be respected. A bare minimum approach is not considered honourable.

All parties should be seeking consent as a standard consultative outcome. The Crown and proponents should not be able to claim justification for infringement to Aboriginal rights unless consent was sought from the outset. It is not necessary that consent is achieved, but it is necessary to demonstrate that you attempted, honourably, to attain it.

Establishing a justification to infringe Aboriginal rights is a very difficult test to meet. A project should never be approached from the position that justifiable infringement is the expectation from the start. Infringement is almost never justified.

Intra-Indigenous Issues – Shared Territories
Commentary provided by
Mark Smith, BC Treaty Commission
Jean Teillet, Pape Salter Teillet LLP

Governments perceive shared territory as a problem, but what if it this complexity was simply interpreted as "the land was rich"? All stated rights are valid, whether the First Nations in question are in the treaty negotiation process or not. Government organizations and proponents must adjust their positions and proceed on the basis of rights recognition, not denial.

The Crown being involved in intra-Indigenous conversations can sometimes make a situation worse. Crown law is often inappropriate to address the matters at hand, or the law that is available is not applied (i.e. Heritage Conversation Act has rarely been enforced or implemented in its full effect).

Consultation on Cumulative Effects
Commentary provided by

Robert J. M. Janes, Q.C. , JFK Law Corporation

The courts have recognized that it is impossible to parse cumulative effects in consultation, but give no instruction on how to marry the two. Cumulative effects are at odds for proponents and decision makers, because previous or nearby projects may belong to other businesses or entities not parties to the project being reviewed.

From the perspective of First Nations, their way of life is at a tipping point. It is critical to see the big picture. It is currently an impossible situation to balance the needs and interests of First Nations with the impacts of cumulative effects in their territories in the current approvals framework.

There are simply no clear road maps yet, and no best practice. It will take time to figure out what works to address concerns around cumulative effects.

Beyond Consultation: Towards Co-management
Commentary provided by
Maxime Faille, Gowling WLG

Resource co-management regimes offer alternatives to traditional resource management regimes. They present the opportunity to reduce conflict and promote sustainable, responsible resource development that will benefit all stakeholders.

There has been a great deal of discussion about consent as described in UNDRIP, and the Free, Prior and Informed Consent (FPIC) concept. FPIC is often erroneously portrayed as an Indigenous 'veto' on economic development. But the concept of a 'veto' presupposes that Indigenous communities are not legitimately part of the decision-making the process to begin with. It is offensive to characterize consent as a veto, but at the same time, we must recognize that consent does embody the right to say no as an outcome of the engagement.

When two or more parties' approval is required for something to occur, we speak in terms of mutual consent –not that each holds a 'veto.' It should be recognized that when we seek to exclude parties from having a role in decision-making, the natural reflex is for them to oppose. Conversely, involving parties in complex, multi-faceted decisions is more likely to lead to good decisions and approvals. The parallel with consent in interpersonal relationships makes these arrangements obvious.

The questions organizations should ask themselves, together with First Nations, are:

- What is the most effective way to implement free, prior, and informed consent?
- What kinds of mechanisms are available to us?
- How do we work to de-escalate confrontational rhetoric and institutionalize mutual decision-making?

Co-management is an institutional arrangement where jurisdiction for the management of natural resources and the environment is shared between governments, including local Indigenous governments, and resource users. Co-management boards make joint recommendations or decisions as to the use, protection, and development of natural resources.

These models exist in a variety of forms in a number of geographical regions, but are particularly prevalent in the modern treaty context in the north. The Sahtu Dene Metis Comprehensive Land Claim Agreement is a good example of a co-management regime.

Co-management agreements may be negotiated in response to specific circumstances, including as a means of crisis resolution, in response to an unresolved land claim, or a contested resource development project.

The presenter noted that co-management is not something to fear. In fact, you are more likely to get to yes through a co-management regime. First Nations are not anti-development. What they need is for development to be in sync with community needs and values. In practice, this is not difficult to understand and work with.

COST

The cost of the seminar was $1044.75.

CONCLUSION

Staff will continue to monitor developments and trends in emerging case law with relevance to the FVRD and its member municipalities, reporting back to this committee as appropriate.

COMMENTS BY:

Jennifer Kinneman, Director of Corporate Affairs

Reviewed and supported.

Mike Veenbaas, Director of Financial Services

No further financial comments.

Paul Gipps, Chief Administrative Officer

Reviewed and supported

Attachments:

1. PBLI Seminar Agenda
2. Principles Respecting the Government of Canada's Relationship with Indigenous Peoples