SUMMARY OF BC COURT OF APPEAL DECISION IN

HAIDA NATION V. MINISTER OF FORESTS AND WEYERHAEUSER

AND

IMPLICATIONS FOR LOCAL GOVERNMENTS

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Introduction

On February 27, 2002 the BC Court of Appeal delivered a landmark decision regarding the duty of the Crown and third parties to consult with First Nations who have asserted, but not proved, aboriginal rights or title. The order made by the Court was subsequently modified with supplemental reasons delivered on August 19, 2002. UBCM requested this report to provide members with an understanding of the decision and its implications for local governments in British Columbia. Specifically, this report provides information on:

1. CASE OVERVIEW

The case involves an application brought by the Council of the Haida Nation under the *Judicial Review Procedure Act* seeking to declare invalid the Minister of Forests' decisions to (i) offer replacement Tree Farm Licenses to Weyerhaeuser Company Limited (or its predecessor MacMillan Bloedel Ltd.) for TFL 39 on the Queen Charlotte Islands and (ii) approve a transfer of TFL 39 from MacMillan Bloedel to Weyerhaeuser (this second matter appears to have not been pursued in the appeal). TFL's are issued as a replaceable tenure under the *Forest Act* and the Act requires that the Minister must provide a replacement TFL to the license holder at specified intervals unless certain conditions occur.

At the initial hearing the BC Supreme Court denied the Haida Nation's application for judicial review but made several findings of fact regarding the strength of the Haida Nation's claim of aboriginal rights and title on the Queen Charlotte Islands. The trial court also found that the Crown was under a moral, but not legal, duty to consult the Haida concerning their aboriginal claims in making the decision to replace TFL 39.

The Haida appealed this judgement to the BC Court of Appeal and the court decided that the principal question to consider was whether there was an obligation on the Crown and on third parties to consult about potential infringements with aboriginal people who have asserted aboriginal title or rights, before aboriginal title or rights have been determined by a court. If such a legally enforceable duty exists, then the court could have discretion to provide a remedy under the *Judicial Review Procedure Act* if a statutory decision maker such as the Minister of Forests makes a decision in breach of that legal duty.

Like the lower court, the Court of Appeal declined to grant the Haida Nation an order that the replacements of TFL 39 were invalid or should be quashed, but disagreed with the lower court's finding regarding the duty of consultation. **The Court of Appeal made a declaration that the Province had in 2000, and the Province and Weyerhaeuser have now, legally enforceable duties to the Haida to consult with them in good faith. This included a duty to endeavour to seek workable accommodations between the aboriginal interests of the Haida and the short term and long term objectives of the Crown and Weyerhaeuser to manage TFL 39 in accordance with the public interest, both aboriginal and non-aboriginal.** The court said in its original reasons that this enforceable legal and equitable duty continues until Haida title and rights are determined by treaty or by a court. The court also said that a decision as to whether the TFL 39 replacements were invalid or void would be better made when the determinations of aboriginal title, rights, infringement and justification are dealt with by a later court.

2. WHAT'S NOT NEW

The Court of Appeal decision in the Haida Nation case builds upon earlier decisions of courts in British Columbia and elsewhere and much of what was said here has been said before. In particular, the Court has reaffirmed the following points:

(1) **The Province of British Columbia has the constitutional authority to infringe aboriginal rights by laws of general application.** This had been in doubt since a recent Court of Appeal decision in *Taku River Tlingit First Nations v. Ringstead*, where it was said that the analysis in *Delgamuukw* regarding the division of powers and the Constitution would apply to limit the power of the Province to infringe aboriginal rights and title. In *Haida Nation* the court clarified that what the court meant in *Taku River Tlingit* was that provincial Legislatures lack capacity to authorize an infringement by a law in relation to "Indians and Land reserved for Indians" (a matter coming exclusively under federal jurisdiction), but do not lack authority in respect of an infringement of aboriginal title by a law of general application.

(2) **The roots of the obligation to consult lie in the trust-like relationship between the Crown and aboriginal people.** This trust-like relationship is a fiduciary duty owed by both the Federal and Provincial Crown and whenever it arises it is a duty of good faith.

(3) **The nature and scope of the duty of consultation will vary with the circumstances of each case.**

3. WHAT *IS* NEW

The *Haida Nation* case provides new information about the duty of consultation, as follows:

(1) **Third parties such as Weyerhaeuser can have a legally enforceable duty to consult and seek workable accommodation of First Nation interests.** We are not aware of any similar finding in Canadian aboriginal law.

(2) The court has clarified that the legal duty of consultation can arise upon the assertion of a good *prima facie* case of aboriginal title and rights and it did not require a court to determine those rights before the duty will arise. Technically speaking this is not a new finding but more of a clarification of what the Supreme Court of Canada meant in *Delgamuukw*, and a majority of the Court of Appeal decided in the *Taku River Tlingit* case (delivered about a week before hearing the Haida Nation appeal). **The courts are saying that the major aspects of justification of a possible infringement, including consultation, must be in place before the infringement occurs and, normally, before the aboriginal right is proven in court.** The scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim for aboriginal title and aboriginal rights. This will require the exercise of considerable judgement by the Crown and any third parties that face this duty.

(3) **The court describes a positive obligation to make reasonable enquiries about the evidence of aboriginal title and rights when asserted.** It says that the obligation to consult and seek accommodation arose in part from the knowledge of Haida claims through evidence supplied by the Haida and through evidence available on reasonable enquiry.

(4) **The obligation to consult the Haida Nation extended both to the cultural interest and economic interest of the Haida people.**

(5) **The court confirmed that it has wide discretion in shaping the appropriate remedy in judicial review proceedings that are taken before any final determination of aboriginal title and rights.** The aim of the remedy should be to protect the interests of all parties pending the final determination of aboriginal title and rights, and now was not the proper time to decide whether a breach of the duty of consultation would invalidate the TFL replacements or the TFL transfer. This new approach opens the door for more declarations of a

consultation duty without resolving until a later time the question of the final remedy.

(6) **The court pointed to a new legal framework for addressing the assertion of aboriginal rights and title** when it said:

> "*This case [for judicial review]… could provide the beginning of an alternative framework for dealing with the reconciliation of claims to constitutionally protected aboriginal title and aboriginal rights, on the one hand, and the public interest, both aboriginal and non-aboriginal, in the elusive economic prosperity of the primary industries of the province.*"

(7) **The court expects that consultation with First Nations will occur at all appropriate times and levels.** While line Ministries and third parties often consult with First Nations regarding "on the ground" decisions and impacts, there will be other decisions at a higher level, such as a tenure replacement or change of ownership, that provide opportunities to include terms that could address the major concerns of the First Nation on a long term basis.

4. DOES THE *HAIDA* DECISION AFFECT PRIVATE LAND AND TENURES?

The *Haida* decision suggests that private parties who acquire rights to use or occupy Crown land or resources may have a legal duty to consult with affected First Nations depending upon the circumstances. The decision does not refer to or deal with fee simple land and, given the split reasons of the court for making its order against Weyerhaeuser, gives little guidance regarding the duties, if any, of private landowners.

In the circumstances of this case, the Court concluded that the Crown had breached a duty of consultation owed to the Haida in approving the replacement of TFL 39. One of the three judges would have confined the Court's order to the duty of the Crown. A second judge, Chief Justice Finch, took the view that short of an order to invalidate TFL 39, any order that did not also recognize a duty of Weyerhaeuser would be ineffective due to Weyerhaeuser's day to day control of operations on TFL 39. He agreed that Weyerhaeuser should be declared to have a duty of consultation from now forward.

In more extensive reasons, Justice Lambert agreed to restrict the Court's current order as Chief Justice Finch had done, but concluded that Weyerhaeuser had a duty to consult with the Haida for three different reasons: First, he found that a duty to consult arose from the language in the *Forest Act* and the TFL document. Second, he found that a fiduciary duty passed from the Crown to Weyerhaeuser by the principles of constructive trust. In his opinion Weyerhaeuser must have been aware of the Crown's fiduciary duty to consult the Haida and the Haida's strong claims to title and rights and must have been aware, or could have become aware on reasonable and necessary enquiry, that the Crown had breached its fiduciary duty by failing to consult the Haida. Lastly, Justice Lambert discussed the role of consultation in the justification of an infringement of aboriginal rights or title and pointed to the significant potential liabilities for an unjustified violation of aboriginal title or rights. While the Crown has a primary duty of consultation, in Justice Lambert's view there are some areas where

consultation would not be effective to justify infringement without the participation of the private party and a private party cannot obtain the protection of "justification" unless it cooperates to ensure the justification standards are met.

These reasons from the Court are consistent with a long series of judgements in which the Courts have encouraged the parties to negotiate settlement of their differences, but **the split reasons make it difficult to determine when a legal duty of consultation and accommodation will arise for parties other than the Crown.** While claims to aboriginal title or rights may be asserted over privately-held lands, and interim injunctions have been granted in a few cases, **we are not aware that any court in British Columbia has yet made a final ruling that owners of privately-held lands must consult with First Nations who assert aboriginal claims prior to making any lawful use of those private lands.** However, if circumstances arise that are similar to the facts in the Haida decision, this matter may come before the courts. Pending such a ruling from the courts, a previous statement of one justice of the Court of Appeal remains apt:

> "*Sooner or later, the question of whether those who hold certificates of indefeasible title, whether to ranch lands on Kamloops Lake or to a small lot with a house on it on Railway Avenue in the Village of Ashcroft or an office tower on Georgia Street in the City of Vancouver, are subject to claims of aboriginal right must be decided*."[1]

5. THE *HAIDA* DECISION AND LOCAL GOVERNMENTS

The potential for independent consultation obligations on third parties arising from the *Haida* decision may directly affect how local governments acquire, use and regulate Crown lands and resources. The duty on local governments may in fact be greater than the duty found to apply to Weyerhaeuser in *Haida,* because local governments exercise directly delegated Provincial powers.

a. Land Use Regulations

Local governments have broad regulatory powers within their jurisdictions. One of the most significant is the power to regulate land use. At common law, an owner of land has the right to make any use of that land that does not create a nuisance. Local government land use regulatory powers operate to reduce or limit that common law right of land ownership. Municipal councils and regional district boards in British Columbia are vested "with authority to restrict, in a material degree, the exercise by an owner of land of his rights of ownership".[2] Local government land use regulations do not create new rights or privileges, nor do they grant additional rights to owners above the common law rights of ownership.

The nature of local government land use regulation is therefore very distinct in character from legislation such as the *Forest Act* considered in the *Haida* decision, under which the Minister of Forests may grant to third parties rights over Crown timber

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[1] *Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)* 2000 BCCA 525, Reasons for Judgment of Southin J.A.

[2] *Toronto R.C. Sep. S. Trustees v. Toronto* [1924] S.C.R. 368 at 373.

resources. Local governments have only limited powers to affect provincial or federal Crown lands or resources. Section 14 of the *Interpretation Act* exempts the provincial government from any regulations that would affect its ability to use or develop land or improvements owned by the Province. Federally, the division of powers in Canada's Constitution restricts the ability of local governments to affect federal Crown lands and resources, including lands reserved for Indians.

Local government land use regulatory powers are permissive rather than mandatory, meaning that local governments are under no obligation to regulate land uses within their geographic jurisdiction. Thus, extensive areas of land in British Columbia are not within official community plans or subject to zoning regulations, although land use may also be restricted through other provincial legislation, such as the *Agricultural Land Reserve Act*. Although no court has yet considered this matter, a court might be reluctant to make a ruling that would not have consistent application across the Province.

On the premise that the *Haida* decision does not impose a generalized duty to consult on owners of privately-held lands (who acquired those lands without a legal defect or knowledge of asserted claims), the decision similarly should have no effect on local government land use regulatory powers on such land, which only give local governments the ability to restrict the common law property rights of owners of privately-held lands.

b. Regulating Crown Lands and Resources

Local governments have some regulatory authority over certain uses of provincial Crown highways and parks within their jurisdiction. These powers are usually limited by statute, by common law, or both, and the impact of local government regulation in most of these situations is fairly minimal. Municipalities, for example, have statutory possession and control over highways within their boundaries and the ability to regulate the use of local parks to which the Crown has acquired title by way of the subdivision of lands or otherwise. **For example, if a local government is aware that a claim to aboriginal rights within a local park has been asserted, and the local government proposes to regulate the use of that park in a way that might infringe those potential rights, a duty to consult similar to that found in *Haida* may exist.**

c. Acquiring Crown Lands or Resources

The court in *Haida* found that a third party, Weyerhaeuser, had a duty to consult with affected First Nations. One of three of the Justices found the duty arose both as a result of Weyerhaeuser's statutory obligations under the *Forest Act*, and on the basis that Weyerhaeuser was a constructive trustee who was or should have been aware that the Crown had failed to discharge its fiduciary duty. This finding may well apply to other third parties seeking to develop or acquire rights to Crown lands or other Crown resources. **Local governments negotiating with the provincial Crown to acquire leases, fee simple title, or other rights to use Crown lands and resources in the face of an asserted claim to aboriginal title or rights may wish to independently ensure that the Crown's fiduciary duty of consultation, and any duty of their own, has been satisfied.**

To review whether the Crown has fulfilled its fiduciary duty, local governments should ascertain first whether an aboriginal claim to title or rights has been made with respect to the Crown land or resources under consideration and assess the soundness of that claim. Second, if a claim exists, local governments should consider whether the proposed disposition or use of the land or resources will infringe that potential aboriginal title or right. If the answer to this question is yes, local governments will need to consider whether the infringement is or can be justified. The Court in *Haida* reiterated the principles for justification of an infringement of aboriginal title or rights as including:

- **Objectives**: are there compelling and substantial objectives for the infringement;
- **Reasonable**: is the infringement reasonable;
- **Undue hardship**: does the infringement impose undue hardship;
- **Fiduciary duty**: is the infringement consistent with the fiduciary duty owed to the holders of the title or right;
- **Infringement:** is the infringement as minimal as possible;
- **Compensation:** if the infringement causes destruction or damage to the land values, has fair compensation been made available;
- **Consultation and Accommodation:** whether the holders of the title or right in question have been consulted with respect to the infringement before it occurs and have been consulted about the alternatives in relation to the infringement and about the accommodations which might be available to minimize the infringement; and
- **Economic Interests:** the extent to which the economic interests of the First Nation and of the public at large are affected by the objectives of the infringement.

Local governments, on the strength of the *Haida* decision, should consider whether the foregoing tests have been met prior to acquiring or dealing with Crown lands or resources.

d. Statutory Consultation

Section 879 of the *Local Government Act* (LGA) requires local governments to consider whether consultation is required during the development of an official community plan or its amendment or repeal. Specifically, local governments must consider whether consultation is required with regional district boards, councils of adjacent municipalities, First Nations, school district boards, Provincial and federal governments and agencies, and others. In Haida, the *Forest Act* required Weyerhaeuser to propose consultation measures in its management plan for TFL 39, which would appear to be a not dissimilar requirement. However, Weyerhaeuser's license entitled it to the use of Crown resources. As noted above, the ability of local governments to affect Crown lands and resources through land use regulations is very limited.

Nothing in LGA s. 879 creates a special standard that local governments must apply when they consider whether consultation with First Nations may be required or how those consultations should be carried out. It is not known whether a court would import into s. 879 the consultation tests developed in the case law for First Nations claims to Crown lands or resources. However, prudence suggests that local

governments give adequate consideration to First Nations interests in determining their policies under s. 879.

Local governments may develop their own policies on how consultation will be considered and carried out to meet the requirements of section 879. In discharging their duties under this section, local governments may wish to develop policies that will achieve certain key principles for good consultation practice, including:

- **Good faith** – local governments should act in good faith when considering when and with whom consultation should occur;
- **Reasonable efforts** – local governments should be able to demonstrate that reasonable efforts have been made to achieve effective consultation with those affected;
- **Anticipated effects** – local governments may wish to invite potentially affected persons, groups or organizations to identify any issues of concern;
- **Level of consultation** – to achieve a level demonstrating reasonable efforts, the degree of consultation should be reasonably proportionate to the soundness of First Nations claims and the degree to which the First Nations may be affected by the local government decision;
- **Decision making** – councils or boards are responsible for discharging the duty in s. 879, unless the authority has been properly delegated to appropriate managers or staff;
- **Considering input** – the issues identified by local government and affected third parties should be clearly addressed in the decision making process; and
- **Transparency** – the consideration by local government of who should be consulted, and the results of that consultation, should be clearly documented.

6. SUMMARY CONCLUSIONS

The court's decision in *Haida* that a third party may have a legal and equitable duty to consult with First Nations is, for some, an unanticipated expansion of the common law. Although no court appears to have considered whether local governments may have a similar duty in their regulatory capacity or otherwise, what is fairly clear is that the law regarding aboriginal rights and title, and the duty to consult, will continue to evolve.

Today, however, the *Haida* decision should not significantly affect how local governments do business, except where they regulate or seek to acquire rights to Crown lands or resources. In those situations, a local government should consider whether First Nations rights may be affected, and if so, what degree of consultation and accommodation by the Crown has been undertaken. The failure to do so may make local governments receiving rights to Crown lands and resources constructive trustees as a result of the Crown's fiduciary obligations to First Nations.