

## THE TSIHQOT'IN NATION AND DUTY TO CONSULT CASES:

What do they mean for local government?

Reece Harding  
March 25, 2015

## Foundation Principles

- Section 35(1) *Constitution Act, 1982*  
"The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
- 17 words
- This is our Constitution; supreme law

## *Delgamuukw v. B.C. (1997)*

- Number of important cases before and after section 35(1) of the *Constitution Act, 1982* but all comes together in *Delgamuukw*
- first case to decide aboriginal title could exist, includes:
  - Like fee simple; better
  - Right to use land
  - Right to occupy land
  - Possess land
  - Economic benefits

## *Delgamuukw v. B.C. (1997) cont.*

- *Delgamuukw* did not decide:
  - Actual title to any land; or
  - Extent of aboriginal title lands
- 17 years later comes *Williams* (or *Tsilhqot'in v. B.C.*)

## *Tsilhqot'in v. B.C. (2014)*

- June 2014 SCC decision
- many legal scholars suggest most important cases in B.C. history
- brief review of case
- firmly established aboriginal title exists; it was proven!!
- Court declared a large area of land (1700 square km) to the First Nation

## *Tsilhqot'in v. B.C. (2014) cont.*

- 3 key points:
  - first ever case to prove aboriginal title; there will be more!
  - areas granted will likely be large
  - aboriginal title protected by s.35(1) of the *Constitution Act*; makes it a "super" fee simple

### *Tsilhqot'in v. B.C. (2014) cont.*

- Implications?
  - New neighbours; like new local governments
  - Aboriginal Title is a real thing; cannot be taken away
  - Negates past resource agreements; must renegotiate
  - Economic implications moving forward (?)
  - Regulatory implications (?)
- Questions/Discussion

### The Duty to Consult & Accommodate

- *Haida Nation v. B.C.*, 2004 SCC 73 is the legal basis
- The Crown duty arises when:
  1. the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or claim;
  2. the Crown contemplates a decision or conduct that engages the Aboriginal claim or right; and
  3. the contemplated Crown decision or conduct may adversely affect the Aboriginal claim or right
- Remember, Crown duty arises pre-proof
- Talk about 2 duty to consult cases and how they affect local governments in future

### Neskonlith Indian Band v. Salmon Arm 2012 BCCA 379

- Facts
  - A proposed shopping centre project was sited on private land in a sensitive riparian area upstream of the Neskonlith's reserve
  - The Neskonlith considered the affected area their territory, but were not involved in litigation nor negotiations for aboriginal title

### Neskonlith Indian Band v. Salmon Arm 2012 BCCA 379

- Facts
  - The Developer applied to the City for an Environmentally Hazardous Area development permit
  - The City notified the Neskonlith and provided information as per usual policies
  - The City issued the development permit
  - The Neskonlith claimed they were not adequately consulted as per *Haida Nation* duty to consult

### Neskonlith Indian Band v. Salmon Arm, 2012 BCCA 379

- BC Court of Appeal
  - Besides s.879 of the *Local Government Act*, local governments have neither the authority nor duty to consult with First Nations
  - Practically speaking, local governments do not have the resources to consult with FNs every time a decision affects their rights

### Neskonlith Indian Band v. Salmon Arm, 2012 BCCA 379

- BC Court of Appeal
  - Local governments need only fulfill their statutory obligations when issuing DPs or building permits, or amending Official Community Plans or zoning bylaws
  - In the absence of a statutory obligation, local governments have no duty to consult
  - Reconciliation of aboriginal rights or title are the responsibility of the Crown, not local governments

## Squamish Nation v. B.C., 2014 BCSC 991

### ■ Facts

- Squamish & Lil'wat Nations challenge Minister's approval of the Whistler OCP
- s.11 of the *RMOW Act* requires Ministerial approval
- very lengthy engagement between Nations and Whistler under s. 879 of the *Local Government Act* re draft OCP
- "short and unproductive" consultation with the Crown:
 

"Once the Ministry received Whistler's engagement record, I am of the view that the consultation process engaged in by the Province relied almost exclusively on Whistler's engagement record. The Province made little attempt to engage in its own consultation; it made no attempt to involve any other ministry with whom the Nations dealt in other ongoing negotiations; and it denied requests for further consultations because of time constraints imposed by the upcoming election."
- quashed the Minister's approval

## Squamish Nation v. B.C., 2014 BCSC 991

### ■ BC Supreme Court

#### ■ *Squamish Nation* follows *Neskonlith*:

"The approval process of the OCP by the Minister may be the only opportunity the First Nations have for consultation with the Crown on potential infringements on their s.35 rights. The Court of Appeal made it clear in *Neskonlith Indian Band v. Salmon Arm*, 2012 BCCA 369 at paras. 68, 70 that the honour of the Crown which gives rise to the duty to consult with First Nations does not apply to municipalities..."

- Minister's decision to approve OCP must maintain "honour of the Crown" as Court concluded OCP may infringe claimed rights and title
- Why is it the "only opportunity the First Nations have for consultation with the Crown...?"

## What do these cases mean?

- A local government does not have a *Haida Nation* duty to consult First Nations
- *Neskonlith* is clear legal authority for local governments that their consultative obligations to First Nations when dealing with permit issuance or bylaw enactment are rooted in their statutory obligations
- The B.C. Court of Appeal is effectively saying in *Neskonlith* and that these types of local government actions do not impact a First Nation's aboriginal rights or title

## What do these cases mean?

- The B.C. Supreme Court's conclusion in *Squamish Nation* that an OCP may have an adverse impact on aboriginal title rights runs somewhat contrary to this conclusion
- Given the unique facts and unique statutory requirement that the Crown must approve the Whistler OCP it does not take away from that larger legal principle in *Neskonlith*
- The *Squamish* decision has changed nothing, at least, for now
- Questions/Discussion